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California Supreme Court Survey - A Review of Decisions: December 1997-March 1998

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California Supreme Court Survey

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The California Supreme Court Survey provides a brief synopsis of recent decisions by the supreme court. The purpose of the survey is to inform the reader of issues that the supreme court has addressed, as well as to serve as a starting point for researching any of the topical areas. Attorney discipline, judicial misconduct, and death penalty appeal cases have been omitted from the survey.

Summaries provide a brief outline of the areas of law addressed in selected California Supreme Court cases. Summaries are designed to provide the reader with a basic understanding of the legal implications of cases in a concise format.

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In the context of workers' compensation, an employer's insurer is subrogated to the employer's contractual rights and duties when the insurer stands in the employer's shoes in litigation; thus where an insurer initiates litigation against a third party, the third party has a right to recover attorney fees from the insurer based on the terms of the contract executed by the employer and the third party.

I. Appellate Review

The accelerated time frame of thirty days in which to file a notice of appeal to a final judgement in a cause of action involving the validity of agreements entered into by public bodies also applies to appealable orders entered in those validation actions.

Planning and Conservation League v. Department of Water Resources, Supreme Court of California, Decided January 22, 1998, 17 Cal. 4th 264, 949 P.2d 488, 70 Cal. Rptr. 2d 635.

Facts. California Code of Civil Procedure section 870 provides for an accelerated process for determining the validity of contractual agreements entered into by public agencies. One of the requirements of the accelerated proceedings is a thirty day time period for filing a notice of appeal from final judgement. California Rules of Court normally allow the earlier of either sixty days after notice of entry of a final judgement or 180 days after entry of the final judgement.

The petitioners in the case at hand, the Planning and Conservation League, sued the California Department of Water Resources seeking declaratory and injunctive relief from the enforcement of the 1994 Monterrey Agreement. The agreement outlined the allocation of water to local water agencies. The Planning and Conservation League alleged violations of the California Environmental Quality Act and the non-alienation mandate of Water Code section 11464.

Pursuant to this action, the League issued summons to twenty-eight state water contractors who had participated in the Monterrey Agreement. Several of the state agencies moved to quash service of summons and for summary adjudication. The superior court granted summary adjudication on June 10, 1996 and granted the motion to quash service of summons on June 18, 1996. Notice of entry of the order quashing service was served on June 24, 1998. On August 10 the superior court resolved all causes of action and entered a final judgement in favor of the Department of Water Resources, and notice of this entry was served on August 19, 1996. The next day, the League filed an appeal from the order quashing service of summons. The court of appeal granted the motion, dismissing the appeal on the grounds that it was untimely filed, pursuant to California Code of Civil Procedure section 870. The court of appeal measured the time period for filing a notice of appeal from the order quashing service of summons on June 24, which was beyond the thirty day time limit.

Holding. Affirming the decision of the court of appeal, the California Supreme Court held that the order quashing service of summons was a final judgement and that an appeal filed more than thirty days from the receipt of notice of that order was untimely, and therefore precluded by law.

The court noted that final judgements and appealable orders are distinct creatures. Although appealable orders, such as an order quashing service of

summons, are described as "judgements" in the California Rules of Civil Procedure section 904.1, this broad definition only specifically applies to normal appellate procedure and not to the specific appellate procedure delineated in this statute. Many statutes regarding appeals treat appealable orders and final judgements differently. The plain language of this statute is imprecise as to whether the legislature intended to include appealable orders in the term "judgement." The court noted that the legislative history behind section 870 was to limit the time for appeal in order to reduce the period of uncertainty before the finality of a validation action.

The court determined that the legislative purpose behind the rule for accelerated appellate procedure would be frustrated if different time frames were permitted for appealable orders and final judgements. Additionally, because the plaintiffs in this case did file a timely appeal from the final judgement entered on August 19, 1996, the plaintiffs were not precluded from a remedy at law and as such, public policy considerations were not sufficient to reverse the decision of the lower court.

REFERENCES

Statutes and Legislative History:

CAL. CIV. PROC. CODE § 860 (West 1998) (stating that the nature of a validation proceeding for a public agency shall be *in rem*).

CAL. CIV. PROC. CODE § 870 (West 1998) ("[N]o appeal shall be allowed from any judgement pursuant to this chapter unless a notice of appeal is filed within 30 days after the notice of entry of the judgement . . . .").

CAL. CIV. PROC. CODE § 904.1 (West 1998) (stating that an order to quash service of summons is an appealable order).

CAL. R. OF CT. 2 (West 1998) (setting the normal time frame for filing a notice of appeal as sixty days from a judgement in all cases not governed by California Civil Procedure Code section 870 or other statute).

Case Law:

League to Save Lake Tahoe v. Tahoe Reg. Planning Agency, 105 Cal. App. 3d 394, 164 Cal. Rptr. 357 (1980) (holding that where no appeal had been taken to an order granting a motion to quash service of summons and the time for appeal had passed, the court of appeal did not have jurisdiction to review the order).

Friedland v. City of Long Beach, 62 Cal. App. 4th 835, 73 Cal. Rptr. 2d 427 (1998)

(stating that the validation action enacted by the legislature serves to quickly affirm the legality of a public agency's transactions, thereby facilitating the operation of the public agency).

Gould, Inc. v. Health Sciences, Inc., 54 Cal. App. 3d 687, 126 Cal. Rptr. 726 (1976) (holding that an order granting a motion to quash service of summons was a final judgement and therefore appealable).

Legal Texts:

4 CAL. JUR. 3D *Appellate Review* § 20 (1998) (discussing the manner of computation of time for filing of an appeal).

4 CAL. JUR. 3D *Appellate Review* §§ 17-18 (1998) (generally discussing time limitations for filing an appeal and options for extending or shortening that time).

4 CAL. JUR. 3D *Appellate Review* § 58 (1998) (describing appeals from an order granting a motion to quash service or summons).

9 B.E. WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 3 (4th ed. 1997) (discussing the statutory sources of appellate jurisdiction).

9 B.E. WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 126 (4th ed. 1997) (listing appealable and non-appealable orders).

9 B.E. WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 473 (4th ed. 1997) (describing the different time periods for filing an appeal, including the thirty day time period after entry of or notice of entry of judgement in a validation proceeding by a public agency).

Law Review and Journal Articles:

Dorothy Toth Beasley et al., *Time on Appeal in State Intermediate Appellate Courts*, 37 NO. 3 JUDGES' J. 12 (1998) (discussing the importance of timeliness in the performance of state appellate courts).

Jeffrey Dehner, Note, *Due Process Requires Notice of Entry of Final Judgements in Ohio: Moldovan v. Cuyahoga County Welfare Department and Atkinson v. Grumman Ohio Corp.*, 58 U. CIN. L. REV. 1043 (1990) (describing the changes in Ohio law concerning timeliness and notice for appeal when an appealable order is entered).

ANDREW BRANIFF

II. CIVIL RIGHTS

A. California Civil Code section 52.1, which authorizes suit against anyone for threats, intimidation, or coercion that interferes with the exercise or enjoyment of rights under federal or state law, regardless of whether the offender acted under color of law, requires an attempted or completed act of interference with the legal right, accompanied by a form of coercion; however, this section does not apply to a private actor's putative violations of legal guaranties that only limit the state's power.

Jones v. K-Mart Corp., Supreme Court of California, Decided January 29, 1998, 17 Cal. 4th 329, 949 P.2d 941, 70 Cal. Rptr. 2d 844.

Facts. California Civil Code section 52.1 authorizes an action for damages and attorney's fees against anyone who, "whether or not acting under color of law," interferes with an individual's constitutional rights. This code section was enacted primarily as a deterrent to hate crimes.

On the morning of May 26, 1991, sixteen-year-old Belafanti Jones visited a K-mart store in San Leandro, California with his mother, Floyzell, his two sisters, his brother, and other family members. Jones intended to purchase some dye to color a pair of pants. He selected a box of dye from K-Mart's shelves, picked it up, and then proceeded to the electronics department to browse while he waited for his mother to finish her shopping. Though he looked at various items, and handled a calculator and cassette tapes, he did not leave the electronics department with anything except the box of dye. Brian Schmidt, a K-Mart security employee, became suspicious when he saw Jones, an African-American, walking up and down the aisles. Schmidt watched Jones, believing he was a potential shoplifter.

As Jones was walking through the store, one of his cousins told him that his mother was looking for him. Jones went to the women's clothing department in search of his mother. Jones was unable to locate his mother, so he proceeded to the front of the store, thinking that his mother might be in line at the cash register. Near the cash register, Jones encountered his sister Lashall, who told him that their mother was waiting for him outside in their van. Jones put down the box of dye next to one of the cash registers, walked in front of the registers, and exited the store through the front door.

Schmidt did not see Jones put down the box of dye because cash registers and other customers blocked Schmidt's view. Schmidt also did not make any attempt to check to see if Jones had put down the box before exiting the store. Instead, Schmidt called a "code blue," which is K-Mart terminology for an emergency situation requiring back-up assistance. Schmidt and K-Mart's loss prevention manager, McGuinness, ran after Jones and yelled at him, "hey, excuse me." Jones turned around, saw the two men (who were wearing jeans and regular shirts), and continued walking. Schmidt and McGuinness repeated, "hey, excuse me." Jones

stopped and turned a second time and again continued on his way. Schmidt and McGuinness caught up with Jones as he neared the van where his mother was waiting for him. They grabbed Jones by the arms and asked what he had done with the items he had in the store. Jones explained to Schmidt and McGuinness that he had left the box of dye in the front of the store near a cash register.

At this time, Jones' mother got out of the van and asked what was going on. McGuinness told her they suspected Jones of shoplifting and were going to conduct a search of his person. Mrs. Jones asked her son if he had stolen anything; Jones replied that he had not. Mrs. Jones objected to any search and told McGuinness to call the police. McGuinness refused to call the police and asked Jones what was in his left-front pants pocket. Jones replied that it was one of his cassette tapes. Jones then started to remove the cassette tape from his pocket. Mrs. Jones told Jones to put it back and he did. Mrs. Jones again asked McGuinness to contact the police. McGuinness refused to do so for a second time. Mrs. Jones asked her daughter Lashall to telephone the police. McGuinness then conducted a patdown of Jones' pocket. Without Jones' permission and over Mrs. Jones' protestations, McGuinness took the cassette tape.

McGuinness then stated that he needed to handcuff Jones. Mrs. Jones repeated her request that the police be called. McGuinness refused for a third time. He grabbed Jones' left arm to handcuff him, Jones resisted, and a struggle ensued. By this time, four or five K-Mart employees were at the scene and assisted in subduing the sixteen-year-old Jones. In the process, Jones' shirt was torn off, he was thrown against the van and a parked car, punched in the face and neck, and placed in a choke hold. As a result of the assault by the K-Mart employees, Jones suffered painful back, neck, and shoulder injuries.

One of the K-Mart employees took Jones' cassette tape into the store, learned that it was not K-Mart property, and reported back this information to McGuinness, who released Jones. When a San Leandro police officer arrived on the scene, McGuinness told the officer that there had been a misunderstanding about a theft of a cassette tape. Because Jones did not shoplift anything, K-Mart was unable to bring any charges against him.

Jones brought suit against the individual K-Mart employees who mistreated him and against K-Mart Corporation (collectively K-Mart) on a theory of *respondeat superior*. The case went to trial and the jury returned a verdict for Jones on his claims of false imprisonment, battery, interference with his constitutional rights "by using excessive force against him [and] by the illegal search of his person," and negligence. The jury found, however, that Jones was unable to prove his claim that K-Mart discriminated against him and subjected him to violence because of his race. Under the heading of compensatory damages, the jury awarded Jones $1,394.25 in economic damages and $40,000.00 in non-economic damages. The jury further awarded Jones $30,000 for interference with his constitutional rights in violation of

the Bane Act, California Civil Code section 52.1. The jury awarded attorney's fees for the section 52.1 claim in the amount of $188,724 for fees plus $28,038.50 for the cost of the fees application for a total of $216,762.50.

K-Mart appealed the jury verdict and the California Court of Appeal reversed as to the $30,000 award for the Bane Act claim and the $216,762.50 for attorney's fees for the same claim. The court of appeal affirmed as to all other claims brought by Jones.

The California Supreme Court granted review to determine whether a private actor can be sued under the Bane Act for interfering with a plaintiff's constitutional guaranties that limit state power.

Holding. The California Supreme Court affirmed the California Court of Appeal's ruling, which overturned Jones' award for his claim brought pursuant to the Bane Act. The supreme court agreed with the court of appeal's determination that the trial court had erred in instructing the jury that Jones could recover for violation of his state and federal constitutional right to be free from unreasonable search and seizure based on the facts of this case. The court stated that it is well-established that the state and federal constitutional proscription against unreasonable search and seizure applies only to the acts of government officers or their agents. Because the K-Mart loss-prevention personnel were not acting in concert with any officers or agents of the government when they attacked Jones, their conduct did not constitute state action.

The court further held that the legislature did not do away with the state actor requirement by providing that liability may be imposed under the Bane Act whether or not the defendant is acting under color of law. The court reasoned that the "color of law" requirement is a statutory rather than constitutionally mandated requisite to specific civil rights actions. As such, by dispensing with the "color of law" requirement, the legislature did not alter the nature of the rights provided under the state and federal constitutions. Because there was no state action involved, the court held that K-Mart was incapable of violating Jones' right against unreasonable search and seizure under the state and federal constitutions. Thus, no action for any such violation could lie.

REFERENCES

Statutes and Legislative History:

U.S. CONST. amend. IV (right of people to be secure against unreasonable searches and seizures).

CAL. CONST. art. 1, § 13 (right of people to be secure against unreasonable searches and seizures).

CAL. CIV. CODE § 52.1 (West Supp. 1999) (right to bring suit against anyone for threats, intimidation, or coercion interfering with the exercise or enjoyment of rights under federal or state law, regardless of whether the offender acted under color of law).

CAL. PENAL CODE § 422.9 (West 1988) (violation of restraining order or injunction issued by a court pursuant to the Bane Act is a crime).

Case Law:

Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (state action required for Fourth Amendment violation).

Rabkin v. Dean, 856 F. Supp. 543 (N.D. Cal. 1994) (city council members' votes denying salary increases to city auditor were insufficiently threatening to state claim under the Bane Act).

Hill v. National Collegiate Athletic Ass'n, 7 Cal. 4th 1, 865 P.2d 633, 26 Cal. Rptr. 2d 834 (1994) (state action required for violation of CAL. CONST. art. 1, § 13).

Bay Area Rapid Transit Dist. v. Superior Ct., 38 Cal. App. 4th 141, 44 Cal. Rptr. 2d 887 (1995) (Bane Act was not wrongful death provision and, thus, parents of black man who was shot and killed by a white police officer had no standing under the Act to seek damages for interference with their constitutional right to parent).

Legal Texts:

15 AM. JUR. 2D *Civil Rights* § 261 (1976 & Supp. 1997) (discussing civil remedies, actions, and proceedings for civil rights claims under state law).

68 AM. JUR. 2D *Searches and Seizures* § 227 (1993) (discussing that although constitutional provisions against unreasonable searches and seizures only apply to state actors, an illegal search by a private individual may be a trespass or a violation of one's right to privacy actionable in tort).

12 CAL. JUR. 3D *Civil Rights* § 11 (1974 & Supp. 1998) (discussing remedies for civil rights violations under California law).

20 CAL. JUR. 3D *Criminal Law* § 2512 (1985 & Supp. 1998) (discussing the legality of searches by private individuals).

8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 775 (9th ed. 1988 & Supp. 1998) (generally discussing the Bane Act).

Law Review and Journal Articles:

Lisa S.L. Ho, Comment, *Substantive Penal Hate Crime Legislation: Toward Defining Constitutional Guidelines Following The R.A.V. v. City Of St. Paul And Wisconsin v. Mitchell Decisions*, 34 SANTA CLARA L. REV. 711 (1994) (discussing how legislative attempts to quell hate crimes by enacting substantive penal hate crime legislation have met resistance in federal and state courts).

Brian L. Williams, Note, *Criminal Constitutional Law–An Attack On Fourth Amendment Protection: Security Guards And The "Private" Search Doctrine–State v. Buswell*, 18 WM. MITCHELL L. REV. 175 (1991) (discussing a Minnesota case wherein the court held that action by a security guard did not constitute state action so as to invoke the Fourth Amendment).

Peter J. Gardner, Comment, *Arrest and Search Powers Of Special Police In Pennsylvania: Do Your Constitutional Rights Change Depending On the Officer's Uniform?*, 59 TEMPLE L.Q. 497 (1986) (discussing warrantless arrests and searches by private individuals).

CHRISTOPHER BRIDGES

B. A California district attorney acts on behalf of the state when prosecuting and preparing to prosecute criminal violations of state law, as well as when establishing policy and training employees in these areas, and hence a county is not subject to § 1983 liability for the prosecutor's actions in that regard.

Pitts v. County of Kern, Supreme Court of California, Decided January 29, 1998, 17 Cal. 4th 340, 949 P.2d 920, 70 Cal. Rptr. 2d 431.

Facts. Within the meaning of 42 U.S.C. § 1983, a local government, such as a county, is legally a "person." However, neither a state nor a state official, when sued in its official capacity, constitutes a "person" within the understood meaning of § 1983. Thus, while a state will be immunized from liability in a § 1983 suit for civil liability, a county will not.

In 1985, the plaintiffs were convicted of multiple counts of sexual abuse of young children. After serving several years in state prison, the convictions were overturned on appeal in 1990 due to prosecutorial misconduct and errors on the part of the trial judge. In 1991, the district attorney dismissed the case against the plaintiffs, and by 1994, all of the original children who had testified at the trial had recanted their testimony and claimed that they had been forced to testify falsely. After the dismissal, the plaintiffs filed suit against Kern County, the sheriff, the district attorney, and various members of the district attorney's office. The complaint alleged that several deputy district attorneys, as well as an investigator with the district attorney's office, coerced false testimony from the children and failed to reveal exculpatory evidence. The district attorney, who was not personally involved with the case, was alleged to have fostered a policy condoning this type of prosecutorial misconduct.

The trial judge entered summary judgment for the county, holding that the county was absolutely immune from liability for any act for which the district attorney had immunity, and that the county could neither hire, fire, nor discipline the district attorney, an elected public official. The trial court also entered summary judgment for the district attorney.

The court of appeal affirmed the entry of summary judgment against the district attorney, but reversed the summary judgment holding as to the county. The court justified its reversal by stating that a California district attorney has attributes of both a state and local officer. It further held that as a matter of law, the district attorney is not a county policymaker for § 1983 purposes. The California Supreme Court granted review to consider the following: 1) whether a California district attorney acts on behalf of the state or the county when preparing to prosecute and while prosecuting criminal violations of state law; and 2) whether a California district attorney acts on behalf of the state or the county when establishing policy and training employees in these areas.

Holding. Reversing the decision of the court of appeal, the California Supreme Court held that a California district attorney acts on behalf of the state when preparing to prosecute and while prosecuting criminal violations of state law. Further, it held that a district attorney also acts on behalf of the state when training personnel and developing policy regarding the preparation for prosecution and prosecution of criminal violations of state law. Such a decision effectively immunized all counties in California from § 1983 liability with respect to the actions of a district attorney.

The court first reviewed case law of several supreme court cases that established that local governments "can be sued directly under § 1983 for monetary, declaratory, or injunctive relief" and that neither states nor state officials acting in their official capacities are "person[s]" within the meaning of § 1983 when sued for damages. Further, a municipality cannot be held liable under § 1983 solely on a theory of respondeat superior. The municipality is responsible only when its policy or custom inflicts the injury, and the municipality was the "moving force" behind the injury alleged.

After reviewing the policy rationale for prosecutorial immunity, the court then discussed the two issues presented: whether California district attorneys act for the state or the county in conducting a prosecution, and whether they act for the state or county when they establish policy and train and supervise staff.

With regard to the first issue of prosecuting and preparing to prosecute criminal violations, the court examined the functions of a district attorney by reviewing article V of the California Constitution and section 25303 of the Government Code. In contrasting the extent to which both the state attorney general and the county board of supervisors exercise control over a district attorney, the court concluded that these provisions weighed heavily in favor of concluding that a district attorney is a state official in this capacity. The court observed, incidentally, that both the plaintiffs and the county were in agreement on this issue.

The second issue, training and supervising staff, was then resolved quickly by the court. The court held that it logically follows that if the district attorney represents the state in prosecutorial activities, then he or she likewise represents the state when training and developing policy in these areas. "No meaningful analytical distinction can be made between these two functions," the court reasoned. Such may not be the case, the court reasoned, if the plaintiffs were challenging a district attorney's action related to hiring or firing an employee, workplace safety conditions, procuring office equipment, or some other administrative function arguably unrelated to the prosecution of state criminal law violations.

Every California district attorney, for purposes of § 1983 liability, therefore acts on behalf of the state when training personnel for and when developing policy regarding the preparation for prosecution and prosecution of criminal violations of state law. As such, counties are immune from § 1983 liability resulting from actions taken by the district attorney. The court declined to address the issue of whether the

immunity afforded the district attorney under § 1983 derivatively immunizes the county in which he or she holds office.

REFERENCES

Statutes and Legislative History:

42 U.S.C. § 1983 (1994) (defining the basis for compensation and means of deterrence for violations of federal rights committed by persons acting under color of state law).

CAL. CONST. art. V, § 13 (West 1998) (defining the powers and duties of the attorney general of the state).

CAL. CODE REGS. tit. x, § 12524 (1998) (authorizing the attorney general to "conference" with the district attorneys to discuss their duties "with the view of the uniform and adequate enforcement" of state law).

Case Law:

Monroe v. Pape, 365 U.S. 167 (1961) (defining the scope of § 1983 law, and reviving a long-dormant Reconstruction-era civil rights statute).

Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989) (neither states nor state officials acting in their official capacities are "person[s]" within the meaning of § 1983).

Monell v. New York City Dept. of Soc. Serv., 436 U.S. 658 (1978) (local governments can be sued directly under § 1983 for monetary, declaratory, or injunctive relief).

McMillian v. Monroe County, 520 U.S. 781 (1997) (resolving the question of which entity a government official represents when performing a certain function).

Kentucky v. Graham, 473 U.S. 159 (1985) ("personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law.").

Legal Texts:

4 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Introduction to Criminal Procedure* § 1789 (2d ed. 1989) (discussing the duties, powers and restrictions of district attorneys).

4 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Introduction to Criminal Procedure* § 1786 (2d ed. 1989) (discussing principal powers and duties of the attorney general with regard to criminal matters).

20 CAL. JUR. 3D *Criminal Law* § 2292 (1985 & Supp. 1998) (generally discussing the concept of criminal immunity).

19 CAL. JUR. 3D *Criminal Law* § 2032 (1985 & Supp. 1998) (discussing the jurisdiction of the attorney general).

20 CAL. JUR. 3D *Criminal Law* §§ 2296-2297 (1985 & Supp. 1998) (analyzing the scope of immunity in felony prosecutions).

Law Review and Journal Articles

Matthew W. Bennett, *McMillian v. Monroe County, Alabama*, 27 STETSON L. REV. 950 (1998) (analyzing the constitutional import of the *McMillian* case and its impact on governmental liability).

Mary Massaron Ross et al., *Recent Developments in Governmental Liability*, 33 TORT & INS. L.J. 469 (1998) (examining the recent developments in the area of constitutional law and civil rights as they affect governmental liability).

Nat'l Ass'n of Att'ys Gen.: STATE CONSTITUTIONAL LAW BULLETIN, *California: District Attorney is State Official for Purposes of 42 U.S.C. 1983* (1998).

DEREK BROWN

III. COSTS

A. "Reasonable attorney fees and costs" may be awarded to the successful party in a Fair Employment and Housing Act case pursuant to Government Code section 12965 (b) to the exclusion of fees of an expert not ordered by the court unless there is express law authorizing the award of such fees.

Davis v. KGO-T.V., Inc., Supreme Court of California, Decided February 5, 1998, 17 Cal. 4th 436, 950 P.2d 567, 71 Cal. Rptr. 2d 452.

Facts. California Government Code section 12965(b) invests in the trial court the right to award "reasonable attorney fees and costs" to the winning party. This discretionary provision is limited by California Code of Civil Procedure section 1033.5, which states that the fees of an expert that is not ordered by the court to testify at the proceedings are not recoverable unless expressly called for by law. The plaintiff, Steve Davis, was let go from his position as a reporter with the defendant, KGO-T.V., Inc. The plaintiff was fifty-three years old at the commencement of this action and had worked for KGO-T.V., Inc. for twenty years. He alleged wrongful termination on the basis of age, which is a Fair Employment and Housing Act (FEHA) violation. The jury found for the plaintiff and awarded him damages. The trial court entered judgment as such and further awarded him costs and attorney fees. The costs awarded to the plaintiff included, in their total, an amount for expert witnesses not called for by the court. Both parties appealed different aspects of the trial court's decision, and the court of appeal affirmed the lower court's decision in all respects except for one. The court of appeal concluded that the trial court erred when awarding, as costs, the fees of experts not ordered by the courts. The court of appeal reversed the award and remanded the issue to the trial court for a recalculation of costs compatible with its decision. The California Supreme Court granted review to consider whether fees of an expert not ordered by the court may be recovered by the victorious party.

Holding. Reversing the decision of the court of appeal, the California Supreme Court held that the fees of experts not ordered by the court are not an acceptable item to be figured into the costs in an action brought under FEHA. Under common law rule, parties involved in litigation must pay for their costs sustained during proceedings. The right to recover such costs is a statutorily created right. California Government Code section 12965(b) is the statute at issue, and declares that in a FEHA action, "the court, in its discretion, may award to the prevailing party reasonable attorney fees and costs . . . ." Though this statute creates such a right, it does not define exactly what is included in "costs." The plaintiff argued that "costs"

includes any and all items of cost, limited only by the trial court. Prior to a subsequently codified definition of "costs," the term was held to incorporate any fees or charges required by law to be paid to the courts or amounts specifically slated as recoverable. The fees of experts not ordered by the court were considered non-allowable items of cost, justified by the reasoning that "where, as here, an [expert] is not appointed by the court but is employed by one of the parties, the temptation to act in the interest of such party must be apparent and the court should not require the opposite party to pay for the services thus rendered."

The legislature finally defined the term "costs" in California Code of Civil Procedure section 1033.5 by specifying which costs are allowable and which costs are not allowable. Therefore, before and after California Government Code section 12965 (b) was enacted into law, the fees of experts not ordered by the court were not an allowable cost.

The supreme court did note that there are exceptions to the general rule that expert fees not ordered by the court are a cost not allowed, but stated that the legislature could have created an exception for a FEHA action but did not. Those exceptions are limited to certain situations, and the issue involved here is not one of them. Similarly, federal law does not allow expert fees not ordered by the court to be recoverable by the triumphant party. At the federal level, as at the state level, the authorization for expert fees must be expressly stated.

The plaintiff argued that California Government Code section 12965 (b) and California Code of Civil Procedure section 1033.5 are in conflict. As previously stated, both before and after California Government Code section 12965(b) was enacted, the winning party had no right to recover costs of fees for experts not ordered by the court. California Code of Civil Procedure section 1033.5 only codified the already existing law.

The plaintiff also contended that the definition of "costs" renders meaningless the portion of the California Government Code section 12965 stating that the court has its discretion to award attorney fees. This contention is also unwarranted because the trial court has discretion to determine if allowable costs are even necessary, and if necessary, if the costs are reasonable in amount, and can deny or award other allowable costs not mentioned in the California Code of Civil Procedure section 1033.5. The plaintiff argued that at the time of enactment of California Code of Civil Procedure section 1033.5, there was no decisional law regarding this issue. The court was convinced that the legislative intent was only to codify existing law and not to establish new case law on this issue.

The last argument that the plaintiff put forth was a policy argument urging fees for experts to be allowable in order to "make whole" the injured plaintiff, and to provide a financial incentive to bring similar suits forth. The court was only concerned with statutory construction and did not deal with this policy argument, except to reiterate that the traditional common law rule is for each party to bear its own costs, and to state how unpersuaded the court was that an incentive was needed to bring forth like cases. Therefore, fees of experts not ordered by the court were determined to be non-allowable items of costs in FEHA actions.

REFERENCES

Statutes and Legislative History:

28 U.S.C. § 1831 (b) (1994) (stating that federal law does not recognize fees of experts as an ordinary item of costs that may be awarded to a prevailing party in a civil action).

29 U.S.C. §§ 621-634 (1994) (disallowing fees of experts not order by the court in similar civil actions).

CAL. GOV'T CODE § 12965 (b) (West 1998) (allowing reasonable attorney fees and costs to a prevailing party).

CAL. CIV. PROC. CODE § 1033.5 (West 1998) (providing that fees of an expert are not recoverable unless expressly authorized by law).

Case Law:

West Virginia Univ. Hosp., Inc. v. Casey, 499 U.S. 83, 111 S. Ct. 1138, 113 L. Ed. 2d. 68 (1991) (recognizing that federal courts have no power to award expert fees not ordered by the court to the prevailing party unless expressly authorized to do so by Congress).

Metropolitan Water Dist. v. Adams, 23 Cal. 2d 770, 147 P.2d 6 (1944) (discussing that if there is no express authority for an award of fees of an expert witness not ordered by the court, then the fees are not an allowable cost).

Rabinowitch v. California W. Gas Co., 257 Cal. App. 2d. 150, 65 Cal. Rptr. 1, (1967) (disallowing fees for experts employed by one side but not ordered by the court).

Bouman v. Block, 940 F.2d 1211 (9th Cir. 1991) (summarizing that the district court had discretion to award fees of an expert not appointed by the court in a FEHA action but had no analysis and no persuasive effect).

Legal Texts:

7 CAL. JUR. 3D *Attorneys at Law* § 127 (1989 & Supp. 1998) (generally discussing possible attorney's fees).

7 CAL JUR. 3D *Attorneys at Law* § 160 (1989 & Supp. 1998) (generally discussing expert testimony).

8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 756-758 (9th ed. 1989 & Supp. 1998) (discussing generally the Fair Employment and Housing Act).

8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 719 (9th ed. 1989 & Supp. 1998) (discussing generally judgments for federal actions).

Law Review and Journal Articles:

Mary Jo Hudson, Comment, *Expert Witness Fees as Taxable Costs in Federal Courts—The Exceptions and the Rule,* 55 U. CIN. L. REV. 1207 (1987) (analyzing the shifting of costs regarding expert witnesses in federal courts).

Jean R. Sternlight, *The Supreme Court's Denial of Reasonable Attorney's Fees to Prevailing Civil Rights Plaintiffs,* 17 N.Y.U. REV. L. & SOC. CHANGE 535 (1990) (discussing limitations on available attorney fees and costs of witnesses awarded to a prevailing party).

Jeffrey J. Parker, *Contingent Expert Witness Fees: Access and Legitimacy,* 64 S. CAL. L. REV. 1363 (1991) (discussing the availability and importance in general of expert witnesses and their effect on the outcomes of trials).

Jim Douglas, Comment, *The Ethical Problems in Paying Witnesses for their Testimony,* 20 J. LEGAL PROF. 225 (1996) (discussing payment to expert witnesses).

CARY BRUNNER

B. A party in whose favor a voluntary dismissal has been given may recover attorney fees in accordance with a contract provision awarding attorney fees as long as the original claim was that of tort, not contract.

Santisas v. Goodin, Supreme Court of California, Decided February 26, 1998, 17 Cal. 4th 599, 951 P.2d 399, 71 Cal. Rptr. 2d 830.

Facts. The plaintiffs, Benjamin and Anita Santisas, brought an action against Robert and Phyllis Goodin, Goodin Realty Company, and Daniel Guthrie, an attorney for Goodin Realty, for alleged defects in a home bought by the plaintiffs from Robert Goodin acting as an agent for Goodin Realty. The complaint alleged negligence, breach of contract, negligent misrepresentation, deceit, and suppression of fact. The complaint also contained an attachment called "Residential purchase Agreement and deposit Receipt." One paragraph of the purchase agreement described that if any legal action was taken as a result of the agreement, the prevailing party would be entitled to receive from the other party reasonable attorney fees to be determined by the court. After discovery, the plaintiffs dismissed the action with prejudice.

The defendants then moved to obtain reasonable attorney fees under the provision of the purchase agreement. The plaintiffs submitted a brief in opposition of the motion. The motion argued that California Civil Code section 1717 and the California Supreme Court's decision in *International Industries, Inc. v. Open*, 21 Cal. 3d 218, 577 P.2d 1031, 145 Cal. Rptr. 691 (1978), prohibit an award of attorney fees. The superior court granted the defendants' motion and awarded attorney fees. The court of appeal affirmed, holding "that a party who successfully defends a tort action arising from a contract that entitles the winner in any litigation to an award of attorney fees is the 'prevailing party' and may recover such fees as an element of costs, even where the plaintiff dismisses the suit voluntarily."

Holding. The California Supreme Court held that contractual attorney fees provisions are enforceable unless barred by California Civil Code section 1717. In the present case, the defendants could recover for the defense of the tort actions, but not for the breach of contract claim. The court noted that although section 1717 prohibits the recovery of attorney fees if the action is voluntarily dismissed, section 1717 "applies only to causes of action that are based on the contract and therefore within the scope of section 1717."

The court further held that its decision in *Open* did not prohibit the recovery of attorney fees in this case. In *Open*, the court concluded that a defendant in whose favor a dismissal has been awarded in contract claims is not a prevailing party because it is not technically a final judgment. After *Open*, the state legislature

amended section 1717 to bar recovery of attorney fees in contract claims where there is a voluntary dismissal. However, the state legislature did not extend section 1717 to cover tort actions. Therefore, the voluntary dismissal of tort causes of action will not bar recovery of attorney fees.

REFERENCES

Statutes:

CAL. CIV. CODE § 1717 (West 1995) (ensuring mutuality of remedy for attorney fees claims under contract provisions).

CAL. CIV. PROC. CODE § 1033.5 (West 1995) (providing that attorney fees are allowable as costs under contract, statute, or law).

Case Law:

City and County of San Francisco v. Sweet, 12 Cal. 4th 105, 906 P.2d 1196, 48 Cal. Rptr. 2d 42 (1995) (discussing that each party must normally bear the expense of its own attorney fees).

Ecco-Phoenix Elec. Corp. v. Howard J. White, Inc., 1 Cal. 3d 266, 461 P.2d 33, 81 Cal. Rptr. 849 (1969) (holding that ambiguous contract language is to be resolved against the party that prepared the contract).

International Indus., Inc. v. Open, 21 Cal. 3d 218, 577 P.2d 1031, 145 Cal. Rptr. 691 (1978) (holding that voluntary dismissal of contract claims is not a final judgment for purposes of California Civil Code section 1717).

Reserve Ins. Co. v. Pisciotta, 30 Cal. 3d 800, 640 P.2d 764, 180 Cal. Rptr. 628 (1982) (applying the meaning a layperson would ascribe to contract language).

Reynolds Metals Co. v. Alperson, 25 Cal. 3d 124, 599 P.2d 83, 158 Cal. Rptr. 1 (1979) (holding that section 1717 allows for recovery from nonsignatory defendants).

Legal Texts:

7 CAL. JUR. 3D *Attorneys at Law* § 128 (1976) (discussing generally attorney fees).

16 CAL. JUR. 3D *Courts* § 94 (1976) (discussing generally the awarding of attorney fees).

7 B.E. WITKIN, CALIFORNIA PROCEDURE § 134 (4th ed. & Supp. 1997) (discussing generally the recovery of attorney fees).

9 B.E. WITKIN, CALIFORNIA PROCEDURE § 243 (4th ed. & Supp. 1997) (discussing generally the awarding of attorney fees as costs).

Law Review and Journal Articles:

Jineen T. Cuddy, Comment, *Fee Simple? Indeterminable: Inconsistent Procedures Regarding Attorney Fees and Posting Appeal Bonds*, 24 PAC. L.J. 141 (1992) (discussing generally the awarding of attorney fees).

Linda Curtis, *Damage Measurements for Bad Faith Breach of Contract: An Economic Analysis*, 39 STAN. L. REV. 161 (1986) (discussing generally damages for the bad faith breach of contract).

Robert S. Miller, *Attorneys Fees for the Contractual Non-signatories Under California Civil Code Section 1717: A Remedy in Search of a Rationale*, 32 SAN DIEGO L. REV. 535 (1986) (discussing the inequity of section 1717).

Robert E. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 CAL. L. REV. 2005 (1987) (discussing generally long-term contracts and the decision-making process that accompanies the contract formation).

John A. Sebert, Jr., *Punitive and Nonpecuniary Damages in Actions Based Upon Contract: Toward Achieving the Objective of Full Compensation*, 33 UCLA L. REV. 1565 (1986) (discussing the cumulative effect of contract recovery).

G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 433 (1993) (comparing different approaches to contract enforcement).

TODD DOMJAN

IV. CRIMINAL LAW

A. Evidence of two separate enumerated criminal acts on the same occasion, one committed by the defendant and the other by a member of the defendant's gang, are sufficient to satisfy the statutory requirement of California Penal Code section 186.22. Thus, crimes committed by two or more persons on the same occasion are sufficient to establish a "pattern of criminal gang activity."

People v. Louen, Supreme Court of California, Decided December 22, 1997, 17 Cal. 4th 1, 947 P.2d 1313, 69 Cal. Rptr. 2d 776.

Facts. In 1988, the California Legislature enacted the Street Terrorism Enforcement and Prevention Act, or the STEP Act, to eradicate the criminal activity of street gangs. The 1997 amendment of this provision is found in sections 186.20 to 186.27 of the California Penal Code. In order to fall within the definition of a "criminal street gang" under former subsection (f) of section 186.22, three requirements must be met: (1) the group must consist of at least three people and have a group name or sign; (2) a primary activity of the group must be to commit one of the offenses enumerated in the STEP Act; and (3) "the group's members must engage in or have engaged in a "pattern of criminal gang activity." According to section 186.22, a "pattern of gang activity" exists when statutorily enumerated offenses are "committed on separate occasions, or by two or more persons."

On May 27, 1993, Ariel Ramirez was working at a gas station; Ramirez had a red shop rag hanging out of his pocket. Three Cambodians, including the defendant Chanda John Louen, entered the gas station, each with a blue bandana in his back pocket, signifying the gang "Crip." Upon seeing Ramirez's red cloth, the Cambodians took Ramirez to be a "Blood," the "Crip's" rival gang. Later that day, Ramirez's cousin, Jose Ivan Corral, came to the gas station and Ramirez told Corral of his encounter with the Cambodians. Corral went to check out the situation, only to find himself being chased by 40-50 Asians, the defendant being one of them. Corral tripped and fell to the ground. The defendant hit Corral on the head, shoulder, and arm with a baseball bat. On that same occasion, Chad Hen, a member of the defendant's group, struck Corral in the ribs with a tire iron.

The prosecution presented evidence of both attacks in order to establish a "pattern of gang activity" necessary to apply section 186.22 of the California Penal Code. The trial court sentenced the defendant to eight years in prison: three years for assault with a deadly weapon, three years for inflicting great bodily injury, and two years for the "street gang" enhancement. The two years for "street gang" membership was added because it appeared that the crime committed by the defendant benefitted a criminal street gang.

The defendant appealed, arguing that the assault charge against him, coupled with the assault by Hen, was not sufficient to establish a "pattern of gang activity," thereby reducing the defendants sentence by two years. The defendant argued that

the prosecution had to "present evidence of at least one other prior offense of gang activity" in order to meet the statutory requirement necessary to establish a "pattern of gang activity." The court of appeal disagreed with the defendant and affirmed the trial court's decision. The defendant then filed a petition for review with the Supreme Court of California. The supreme court granted review to determine if evidence of the crime with which the defendant was charged, coupled with evidence of a crime committed by a member of the defendant's gang on that same occasion, establishes a "pattern of criminal gang activity."

Holding. The California Supreme Court, upholding both the trial court and court of appeal decisions, held that the prosecution's use of the defendant's assault on Corral, along with Hen's assault of Corral on the same occasion, constituted the requisite "pattern of criminal activity" necessary to link the defendant to a "criminal street gang." Therefore, the defendant was subject to the two-year "street gang" enhancement on his sentence.

On review, the defendant argued that the defendant must have committed a prior offense, or have known of prior offenses committed by the group, in order to establish a "pattern of criminal gang activity." The defendant further argued that an offense predating the current charge was "compelled by constitutional principles of freedom of association and due process." The supreme court disagreed, stating that a prior criminal charge was not a prerequisite to finding a "pattern of gang activity," nor was not having a prior charge a violation of due process.

The defendant further argued that the court's construction of the STEP Act violated ex post facto principles because the interpretation of a "pattern of criminal gang activity" was changed by the 1997 amendment of section 186.22 and the defendant was originally sentenced under the 1988 version of section 186.22. The supreme court disagreed, stating that there was "no uniform appellate rule" that interpreted the statute in a manner contrary to this court's interpretation. Therefore, it did not matter that the defendant was initially charged under the 1988 version of the STEP Act.

Finally, the defendant contended that the legislature intended to increase the prosecution's burden of establishing a "pattern of criminal gang activity" because the legislature changed the language of section 186.22 subdivision (e) from "the offenses are committed on separate occasions, or by two or more persons" to "the offenses were committed on separate occasions, or by two or more persons." The defendant argued that by changing the word "are" to "were," the legislature intended that the defendant commit "two or more"offenses before a "pattern of criminal gang activity" could be established. The supreme court disagreed, stating that the change in verb tense in section 186.22 (e) did not indicate an intent by the legislature to increase the prosecutorial burden of establishing a "pattern of criminal gang behavior." Accordingly, the supreme court held that separate enumerated criminal

acts by the defendant and a member of the defendant's group on the same occasion established the requisite "pattern of criminal gang activity" necessary to sentence the defendant under the STEP Act.

REFERENCES

Statutes and Legislative History:

U.S. CONST. art. I, § 9, cl. 3 (prohibiting Congress and states from passing any *ex post facto* laws).

U.S. CONST. amend. I (stating that every person shall have a right to freedom of association).

U.S. CONST. amend. XIV (stating that no state shall make or enforce any law which abridges the privileges of a United States citizen nor deprive that person of liberty without due process of law).

CAL. CONST. art. I, § 9 (prohibiting the State of California from passing any *ex post facto* laws).

CAL. PENAL CODE § 186.22 (West 1988 & Supp. 1997) (imposing a sentence from one to three years for any person who participates in a street gang and engages in a "pattern of criminal gang activity").

Case Law:

People v. Gardeley, 14 Cal. 4th 605, 927 P.2d 713, 59 Cal. Rptr. 2d 356 (1996) (discussing the legislature's intent to eradicate street violence by punishing criminal defendants who commit an act of violence in order to promote their gang).

In re Nathaniel C., 228 Cal. App. 3d 990, 279 Cal. Rptr. 236 (1991) (discussing the use of the disjunctive "or" in defining a pattern of criminal gang activity).

In re Elodio O., 56 Cal. App. 4th 1175, 66 Cal. Rptr. 2d 95 (1997) (discussing the fact that a pattern of criminal gang activity can be established by combining the crimes of two participants on one occasion).

Legal Texts:

17 CAL. JUR. 3D *Criminal Law* §§ 33-35 (1984 & Supp. 1998) (discussing gang violence).

1 B.E. WITKIN, CALIFORNIA EVIDENCE § 698A (3d ed. Supp. 1998) (discussing sworn statements regarding gang-related crimes).

2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW § 1251B (2d ed. Supp. 1998) (discussing penalties for those engaging in gang related activities).

Law Review and Journal Articles:

Bergen Herd, Note, *Injunctions As a Tool to Fight Gang Related Problems in California After People Ex rel. Gallo v. Acuna: A Suitable Solution?*, 28 GOLDEN GATE U. L. REV. 629 (Spring 1998) (analyzing *People ex rel. Gallo v. Acuna* and explaining that its determination that gangs as a public nuisance does not violate a gang's constitutional right to freedom of association).

Alexander Molina, Note, *California's Anti-Gang Street Terrorism Enforcement and Prevention Act: One Step Forward, Two Steps Back?*, 22 SW. U. L. REV. 457 (1993) (discussing gangs' rights to freedom of association).

Bart H. Ruben, Note, *Hail, Hail, the Gangs All Here: Why New York Should Adopt A Comprehensive Anti-Gang Statute,* 66 FORDHAM L. REV. 2033 (April 1998) (discussing the increase in New York gangs and how the federal government and other states such as California have dealt with the rise in gang crimes).

David R. Truman, Note, *The Jets and Sharks Are Dead: State Statutory Responses to Criminal Street Gangs,* 73 WASH. U. L.Q. 683 (Summer 1995) (discussing the growth of gangs and how several states are enacting legislation, such as the STEP Act, to prevent further gang violence).

Pamela L. Schleher, Note, *California Supreme Court Survey, People v. Gardeley*, 25 PEPP. L. REV. 261 (1997) (discussing *People v. Gardeley* and the prosecution's burden of proving a "pattern of criminal gang activity").

LORIG MUSHEGAIN

B. A trial court's discretion to vacate a prior felony conviction "in furtherance of justice," pursuant to Penal Code section 1385 (a), is subject to review for abuse of discretion, and the court must set forth its reasons for the dismissal in an order entered in the minutes; if the decision to vacate is based on a guilty plea and reversed on appeal, the defendant may return to the status quo at remand by withdrawing his plea.

People v. Williams, Supreme Court of California, Decided January 5, 1998 (Modified February 25, 1998), 17 Cal. 4th 148, 948 P.2d 429, 69 Cal. Rptr. 2d 917.

Facts. Penal Code section 1395 (a) permits a trial court to dismiss an action "in furtherance of justice," requiring that the reasons for the dismissal be entered into the minutes. In *People v. Superior Court (Romero)*, 13 Cal. 4th 497, 917 P.2d 628, 53 Cal. Rptr. 2d 789 (1996), the state supreme court ruled that the dismissal power included the power to vacate allegations of prior felony convictions that are significant in sentencing. Penal Code section 667, the legislative version of the Three Strikes law, mandates a minimum twenty-five year sentence for a conviction for a felony if there are at least two prior felony convictions. In 1995, the defendant, Reginald Williams, was arrested for driving under the influence, which may be charged alternatively as a misdemeanor or as a felony pursuant to Vehicle Code section 23160. At the information, the district attorney alleged that the defendant had been convicted for the same offense three times over the course of seven years. The district attorney also alleged two previous felony convictions, bringing the case under the Three Strikes law. At the subsequent jury trial, the prosecution recited an extensive list of the defendant's criminal background, including parole violations and spousal abuse.

The trial court found no mitigating factors supporting the defendant's motion to declare his offense a misdemeanor, but did state that the Three Strikes law would not apply if it vacated a prior felony conviction, which it deemed appropriate in the case. The defendant responded by offering a guilty plea, which the court accepted. On its own motion, the court found authority to strike a prior conviction under Penal Code section 1385(a), basing its decision on the seemingly non-violent nature of the defendant's crimes and imposing a sentence of nine years in prison. The court of appeal reversed, finding no mitigating circumstances in the record that could justify the order vacating a prior felony conviction. Instead of remanding to the trial court to determine the appropriate sentence, the court of appeal imposed a twenty-eight year sentence under the Three Strikes law. The California Supreme Court granted review to clarify the requirements of its ruling in *Romero*.

Holding. Affirming in part and reversing in part the decision of the court of appeal, the supreme court held that under Penal Code section 1385(a), a decision to vacate a prior conviction must be accompanied by the reasoning behind that decision entered on the minutes. Recalling *Romero*, the court reiterated that the trial court's decision was subject to review for abuse of discretion. If the reason for dismissal

was solely for judicial efficiency or in objection to the Three Strikes law, that dismissal should be reversed.

The test under *Romero* balances the defendant's rights against disproportionate punishment with society's interest in the prosecution of crimes. Factors relevant under the test include the circumstances surrounding the defendant's instant felony conviction, prior felony and other criminal convictions, the violent nature of those crimes, and the defendant's personal character. The absence of a serious criminal background may suggest that the Three Strikes law should not be applied.

However, the court found few mitigating factors supporting the trial court's decision to strike one of the defendant's prior convictions. His frequent parole violations, convictions for various criminal activities, and time incarcerated, as well as his conviction for spousal abuse, suggested that the trial court's conclusion that his character had improved and that his crimes were non-violent was clearly erroneous. Because the dismissal was unsound, the supreme court vacated the judgment and upheld that part of the court of appeal's decision.

On the other hand, the supreme court reversed the sentence imposed by the court of appeal. As the trial court gave no reason for its decision, that exercise of discretion was inherently ineffective. If a decision central to the judgment is ineffective, then that judgment itself is ineffective, and the appropriate remedy is to return the defendant to the status quo before he entered his plea upon the court's inducement. The trial court could reach a different ruling on remand, but it was not obligated to do so.

REFERENCES

Statutes and Legislative History:

U.S. CONST. amend. VIII.

CAL. CONST. art. I, § 17.

CAL. PENAL CODE § 667 (West Supp. 1999) (imposing, by legislative enactment, a minimum twenty-five year prison sentence in a felony conviction on the finding of two or more prior serious or violent felony convictions).

CAL. PENAL CODE § 1170 (West Supp. 1999) (imposing a similar minimum sentence by voter initiative).

CAL. PENAL CODE § 1385 (a) (West Supp. 1999) (permitting the trial judge or magistrate to dismiss an action"in furtherance of justice").

CAL. VEH. CODE § 23160 (West Supp. 1999) (alternatively classifying the offense of driving under the influence as a misdemeanor or a felony based upon the number of prior convictions for the same offense).

Case Law:

Santobello v. New York, 404 U.S. 257 (1971) (requiring a prosecutor to fulfill a promise when a guilty plea is based in any significant extent upon the inducement).

People v. Orin, 13 Cal. 3d 937, 533 P.2d 193, 120 Cal. Rptr. 65 (1975) (defining the standard of review for superior court decisions for effectiveness and soundness).

People v. Superior Court (Giron), 11 Cal. 3d 793, 523 P.2d 636, 114 Cal. Rptr. 596 (1974) (concluding that a court may not exercise its discretion in allowing a defendant to withdraw a guilty plea where that plea was entered in hopes of leniency that is not realized).

People v. Superior Court (Romero), 13 Cal. 4th 497, 917 P.2d 628, 53 Cal. Rptr. 2d 789 (1996) (extending the dismissal power under Penal Code section 1385(a) to include the authority to strike prior felony convictions of defendants facing sentences enhanced by the Three Strikes law).

CHRISTOPHER JOHNSON

C. A criminal defendant offered no evidence that his alleged mental disability rendered him unable to knowingly and voluntarily waive his *Miranda* rights; thus, the trial court did not err by admitting into evidence pretrial statements the defendant made to the police after he waived his *Miranda* rights. Furthermore, the trial court's admission of the defendant's poor driving record into evidence was harmless error because the defendant's own statements to the police eliminated any reasonable probability that the jury's verdict would have been different had the evidence of the defendant's poor driving record been excluded.

People v. Whitson, Supreme Court of California, Decided January 15, 1998, 17 Cal. 4th 229, 949 P.2d 18, 70 Cal. Rptr. 2d 321.

Facts. On June 11, 1993, Costa Mesa Police Department Motorcycle Officer Angelo Morgan observed a man, Derick Romo, running through a commercial building complex parking lot. Upon seeing the officer, Romo headed toward a Volkswagen Cabriolet (VW), and entered the vehicle. The defendant, Scott Alden Whitson, was the driver of the vehicle and immediately sped away once Romo entered the VW. Officer Morgan proceeded to follow the VW, which he estimated to be traveling at approximately 80-85 miles per hour. After losing sight of the VW, Officer Morgan sent a radio broadcast stating that he had discontinued his pursuit. Shortly thereafter, a pedestrian signaled Officer Morgan to report a serious accident at an intersection nearby. Upon arriving at the accident scene, Officer Morgan observed the aftermath of a crash between the VW and an Acura sedan. An accident reconstruction expert estimated that the VW struck the Acura at a ninety-degree angle while traveling approximately seventy-seven miles per hour. Furthermore, there was no evidence that either car attempted to brake, nor was there any evidence of mechanical failure on the part of either vehicle. A pedestrian witness testified that the VW had adequate time to avoid the collision and was approximately one-half block from the intersection when his traffic signal turned red. Janice Diehm, the driver of the Acura, and Romo, the defendant's passenger, both bled to death. The defendant was charged with two counts of murder.

At trial, the prosecution offered evidence that six months prior to the accident, the defendant had been interviewed in connection with an alleged shoplifting incident where police advised him of his *Miranda* rights. At that time, the defendant acknowledged that he understood his rights and agreed to continue the interview with the police. The prosecution also called Christopher Andrews, the officer who interviewed the defendant in the hospital emergency room approximately three hours after the auto accident. Officer Andrews testified that he told the defendant "'you understand you don't have to talk to me if you don't want to.'" After acknowledging in a "'normal'" and "'clear'" voice that he understood his rights, according to Officer Andrews, the defendant proceeded to tell Officer Andrews that, for

unknown reasons, he was being chased by a Hispanic male in a red Cadillac immediately prior to the accident. After Officer Andrews expressed disbelief in the defendant's story, the defendant admitted that Romo was planning on stealing a car stereo at the time Officer Morgan spotted him in the parking lot. The defendant admitted alluding the motorcycle that followed him from the parking lot, but denied hearing the motorcycle's sirens or seeing its lights. He further stated that it was a "'stupid' thing to try to steal the stereo" and that he believed he was traveling approximately sixty miles per hour during the chase.

The second police interview took place at the hospital approximately 17 hours later. Police Sergeant Larry Griswald, accompanied by Officer Andrews and another deputy, readvised the defendant of his *Miranda* rights and asked the defendant whether he understood them. According to Sergeant Griswald and Officer Andrews, the defendant once again responded that he did understand his rights and did not request an attorney, nor did he appear confused. During the thirty-minute interview, the defendant repeated his earlier recollection of the events and added that he was "'scared of the guy chasing me [on the motorcycle].'" He also stated that immediately prior to the collision, he was afraid that the VW might crash.

The police conducted a third interview of the defendant nine days after the accident. Officer Andrews, Sergeant Griswald, and another deputy readvised the defendant of his *Miranda* rights and once again asked him whether he understood his rights. After the defendant responded in the affirmative, Officer Andrews asked "'OK, and having your rights in mind do you want to answer a few questions for me?'" Once again, the defendant responded affirmatively. During the interview, when asked "'[d]id you realize that [traveling at such a high speed] was kind of dangerous?,'" the defendant acknowledged "'[y]es, I did,'" but contended that he continued to drive fast because his passenger, Romo, egged him on to do so. Additionally, the defendant stated that he was "'afraid [he was] going to kill someone or hurt someone else.'" During this interview, the defendant also admitted that no Cadillac had been chasing him prior to the accident.

The prosecution argued that it was entitled to introduce evidence related to the defendant's driving record. Specifically, the prosecution wanted to admit evidence that the defendant had attended traffic school three years prior to the accident, that one month after attending traffic school, the defendant was involved in an accident where police cited him for failing to yield the right of way, that one month after that citation, the defendant received another citation for driving with excessive speed, and finally that the defendant had also failed to obey a posted traffic sign one year prior to the incident for which he was now charged. The prosecution argued that this evidence tended to establish the defendant's "'subjective awareness of the rules of the road and the dangers involved.'"

In response to the prosecution's arguments regarding an implied waiver of *Miranda* rights, the defense introduced testimony of the defendant's stepfather, Ronald Wahl, who spoke with the defendant four hours after the accident, one hour after Officer Andrews' initial interview with the defendant. Wahl testified that the

defendant did not initially recognize him, that he drifted "'in and out,'" that his answers to questions were not loud, clear, or responsive, and furthermore that "'you could see he was in pain.'"

The defense also introduced testimony from a clinical psychologist, Arnold Purisch, who had interviewed the defendant twice approximately six months after the accident. He characterized the defendant as "'anywhere between mentally retarded to borderline intelligence.'" Finally, the defense offered the testimony of Gianna Scannell, a surgeon who examined the defendant shortly after the accident. Dr. Scannell testified that, at that time, the defendant told her he did not remember the accident.

The defendant sought to suppress his pretrial statement to the police, claiming that he had not "knowingly, intelligently, and voluntarily" waived his *Miranda* rights. He alleged that he was incapable of making an intelligent waiver due to his injuries, and furthermore because he was "'functionally retarded.'" The defendant further sought to exclude evidence of his poor driving record, claiming that "such evidence was irrelevant, and, if relevant, was unduly prejudicial."

The trial court found that the prosecution had presented uncontradicted evidence that the police had advised the defendant of his *Miranda* rights prior to conducting each of the three interviews. The court further noted that it did not find an express waiver of *Miranda* rights necessary, but looking at the totality of the circumstances, the defendant was aware of his rights and responded to the questioning without any evidence of coercion or duress. Additionally, the court rejected the defendant's contention that his low intelligence, sufferance of pain from the accident, and medicated state combined to establish that his waiver could not have been knowing and intelligent. Rather, the evidence indicated that the defendant was in control of his faculties and responsive to police questions. Finally, the court found the defendant's poor driving history to be both relevant and not unduly prejudicial. Upon hearing all the evidence, the jury returned a verdict finding the defendant guilty of two counts of second degree murder.

A divided court of appeal reversed the defendant's conviction, concluding that the trial erred by admitting into evidence the defendant's pretrial statements. The court held that the defendant did not waive his *Miranda* rights prior to his conversations with the police. Additionally, the court held that the trial court erred by admitting into evidence the defendant's poor driving record. The court reasoned that a poor driving history, without a showing of similarity between the past and present offenses, "'did not tend to prove the defendant knew his conduct endangered life.'"

Holding. The California Supreme Court reversed the decision of the court of appeal and held that the defendant voluntarily and knowingly waived his *Miranda* rights and therefore the trial court did not err by admitting into evidence the defendant's

pretrial statements made during interviews with the police. Additionally, the court held that the defendant was not prejudiced by the trial court's admitting into evidence his poor driving record because there was no reasonable probability that the jury would have reached a different result had the trial court excluded this evidence.

Noting the lack of any suggestion that the police had resorted to physical or psychological coercion to elicit statements from the defendant, the court focused upon whether the defendant was mentally aware of his *Miranda* rights, and the resulting consequences of a waiver of those rights. The court emphasized that the prosecution must establish that a criminal defendant voluntarily waived his or her *Miranda* rights by a preponderance of the evidence. Furthermore, an appellate court will accept the trial court's findings of facts, inferences, and credibility determinations so long as they are supported by substantial evidence.

Proceeding under these guidelines, the court concluded that the prosecution had presented uncontroverted evidence that the defendant had knowingly and willfully waived his *Miranda* rights during each of his three interviews with the police. Although the defendant possessed relatively low intelligence, the court rejected his contention that he lacked sufficient intelligence to understand the rights and consequences of waiving his *Miranda* rights. The court noted that he was able to pass a driver's test, to attempt to deceive police by claiming to have been chased by a Cadillac, and to acknowledge the stupidity of Romo's plan to steal a car stereo. Furthermore, the court considered the defendant's indication that he understood his *Miranda* rights when he had waived those rights during the encounter with police six months prior to the automobile accident. Considering all of these factors, the court concluded that the evidence amply supported the trial court's finding that the defendant impliedly waived his *Miranda* rights.

Furthermore, the court also considered the trial court's admitting the defendant's poor driving record into evidence as harmless error. Reversible error requires that a reasonable probability must exist that the jury would have reached a different result had the defendant's poor driving record been excluded. Because the prosecution was offering it to support its claim that the defendant was subjectively aware of the serious risks of his reckless driving, the defendant's statement that he was afraid he was "going to kill someone or hurt someone else" independently established this proposition and eliminated any reasonable probability that the jury's verdict would have been different had the evidence of the defendant's poor driving record been excluded. Accordingly, the court reversed the court of appeal's ruling as to both issues.

REFERENCES

Statutes and Legislative History:

U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

U.S. CONST. art. VI, § 13 (permitting federal courts to set aside judgments only when an error "has resulted in a miscarriage of justice").

CAL. CIV. PROC. CODE § 475 (West 1998) (permitting reversal of a lower court's judgment only for prejudicial errors).

CAL. EVID. CODE § 210 (West 1998) (defining relevant evidence as "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.").

CAL. EVID. CODE § 352 (West 1998) (giving the court the discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.").

Case Law:

Colorado v. Connelly, 479 U.S. 157, 168 (1986) (noting that the prosecution must prove the voluntariness of a defendant's waiver of *Miranda* rights by a preponderance of the evidence).

Fare v. Michael C., 442 U.S. 707, 724-25 (1979) (adopting a "totality of circumstances" approach for determining whether a defendant has knowingly and intelligently waived his or her *Miranda* rights).

Miranda v. Arizona, 384 U.S. 436 (1966) (affording defendants the right to remain silent during police questioning to protect their Fifth Amendment right against self-incrimination).

North Carolina v. Butler, 441 U.S. 369, 373 (1979) (concluding that a waiver of *Miranda* rights may be "inferred by the actions and words of the person interrogated").

People v. Ewoldt, 7 Cal. 4th 380, 867 P.2d 757, 27 Cal. Rptr. 2d 646 (1994) ("In determining whether evidence of uncharged misconduct is relevant to demonstrate a common design or plan . . . [t]he least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent.").

People v. Kelly, 51 Cal. 3d 931, 800 P.2d 516, 275 Cal. Rptr. 160 (1990) (accepting the trial court's findings of facts, inferences, and credibility determinations regarding a defendant's waiver of his *Miranda* rights, so long as they are supported by substantial evidence).

People v. Nitschmann, 35 Cal. App. 4th 677, 41 Cal. Rptr. 2d 325 (1995) (upholding a trial court's finding of implied waiver where the defendant failed to offer any evidence that he was confused, misled, or reluctant to speak about an assault).

Legal Texts:

21 CAL. JUR. 3D *Criminal Law* §§ 3165-3166 (1985 & Supp. 1998) (discussing harmless error and its application to improperly admitted character evidence).

6 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Reversible Error* § 3276 (2d ed. 1989 & Supp. 1998) (generally discussing the requirement of prejudice to the defendant for reversal of a judgment).

1 B.E. WITKIN, CALIFORNIA EVIDENCE, *Circumstantial Evidence* § 322 (3d ed. 1986 & Supp. 1998) (discussing the inadmissibility of character evidence for purposes of showing a defendant's propensity for engaging in careless conduct).

Law Review and Journal Articles:

Daniel D. Blinka, *Evidence of Character, Habit, and "Similar Acts" in Wisconsin Civil Litigation*, 73 MARQ. L. REV. 283 (1989) (addressing the admission of a defendant's poor driving record as evidence that the a defendant acted in conformity with that character trait on future occasions).

Paul T. Hourihan, Note, *Earl Washington's Confession: Mental Retardation and the Law of Confessions*, 81 VA. L. REV. 1471 (1995) (discussing the capability of mentally disabled defendants to knowingly and voluntarily waive their *Miranda* rights).

DAVID FORNSHELL

D. A sentencing court has the discretion to strike prior felony convictions under the "three strikes" law while in the presence of the defendant and his counsel.

People v. Rodriguez, Supreme Court of California, Decided January 15, 1998, 17 Cal. 4th 253, 949 P.2d 31, 70 Cal. Rptr. 2d 334.

Facts. The defendant was found guilty of possession of cocaine base for sale. Additionally, the trial court found that the defendant qualified for the "Three Strikes" law. The trial judge stated that he was compelled to sentence the defendant to twenty-five years to life as mandated by the "Three Strikes" law, as he lacked discretion to strike prior felony convictions. However, *People v. Superior Court (Romero)*, 13 Cal. 4th 497, 917 P.2d 628, 53 Cal. Rptr. 2d 789 (1996), a "fully retroactive" decision, held that courts deciding Three Strikes cases do have discretionary power to dismiss prior felony convictions.

The court of appeal purportedly affirmed the trial court's judgment but remanded the case so that the trial court could decide whether or not to exercise its discretion, as permitted by *Romero*. Additionally, the court of appeal held that if the trial court decided not to exercise its discretion, the defendant need not be present and the sentence remains the same. However, if the court decided to exercise its discretion, then the defendant must be present and a new sentencing hearing must be conducted. The defendant appealed the latter instruction, arguing that it violated his constitutional right to be present at all crucial stages of trial.

Holding. Reversing the decision of the court of appeal, the California Supreme Court held that a defendant has the right to be present at the sentencing hearing when the court is determining whether or not to exercise its discretion to strike a prior felony conviction. Additionally, the court held that the trial judge mistakenly believing that he lacked discretion to strike a prior felony conviction raised an issue for appeal. Thus, the case must be remanded in order to make *Romero* fully retroactive.

The court discussed the perplexing standard articulated by the court of appeal that mandated that a defendant only be present if the court had already decided to exercise its discretion. The court stated that the defendant needed to be present at this "crucial stage" of trial in order to articulate arguments in favor of the court exercising its discretion.

Finally, the court held that the defendant's prior felony conviction for assault with a deadly weapon other than a firearm failed to constitute a "serious felony." In order to qualify as a "serious felony" under that section, the defendant must personally inflict great bodily injury or use a firearm. Neither the abstract of the prior conviction judgment nor the prosecution proved that the defendant had in fact

personally inflicted great bodily injury or used a dangerous or deadly weapon. Thus, this felony conviction cannot count as a strike against the defendant.

REFERENCES

Statutes and Legislative History:

U.S. CONST. amend. XIV ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.").

CAL. CONST. art. I, § 13 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated.").

CAL. PENAL CODE § 667(d)(1) (West 1988) (articulating California's Three Strikes Law).

Legal Texts:

22 CAL. JUR. 3d *Criminal Law* § 3608 (1985 & Supp. 1998) (generally discussing when people may appeal).

22 CAL. JUR. 3d *Criminal Law* § 3617 (1985 & Supp. 1998) (generally discussing when a defendant may appeal).

3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment For Crime* § 1515 (B) (2d ed. Supp. 1997) (discussing various constitutional challenges to Three Strikes Laws).

3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment For Crime* § 1518 (2d ed. Supp. 1997) (discussing the impact of *Romero*).

Case Law:

People v. Superior Court (Romero), 13 Cal. 4th 497, 917 P.2d 628, 53 Cal. Rptr. 2d 789 (1996) (granting trial judges discretion to strike prior felony conviction allegations under the Three Strikes law).

People v. Fuhrman, 16 Cal. 4th 930, 941 P.2d 1189, 67 Cal. Rptr. 2d 1 (1997) (withholding relief on appeal in "silent record" cases).

In re Cortez, 6 Cal. 3d 78, 490 P.2d 819, 98 Cal. Rptr. 307 (1971) (holding that a defendant who had been sentenced under a statute that unconstitutionally restricted

sentencing discretion was entitled to a new hearing before the sentencing court with his counsel present).

Law Review and Journal Articles:

Kerry L. Pyle, Note, *Prison Employment: A Long-Term Solution to the Overcrowding Crisis*, 77 B.U. L. REV. 151, 158 (1997) (discussing California's penal system in the context of Three Strikes laws).

Lisa E. Cowart, Comment, *Legislative Prerogative vs. Judicial Discretion: California's Three Strikes Law Takes a Hit*, 47 DEPAUL L. REV. 615, 646-57 (1998) (discussing California's Three Strikes law and the impact of *Romero*).

John Clark et al., *Three Strikes and You're Out*, 81 JUDICATURE 144 (1998) (comparing California's Three Strikes laws to that of other states).

Alternative Punishments: Resistance and Inroads, 111 HARV. L. REV. 1967 (1998) (stating that California's Three Strikes law is the toughest in the land).

California's "Three Strikes" Law: an Unconstitutional Infringement Upon the Power of the Judiciary? 3 SAN DIEGO JUST. J. 535 (1997) (discussing the judicial impact of California's Three Strikes laws).

DAVID BARRY

E. Law enforcement personnel may temporarily seize a dwelling by restricting access to it where there is reasonable suspicion that contraband or other evidence is on the premises.

People v. Bennett, Supreme Court of California, Decided February 2, 1998, 17 Cal. 4th 373, 949 P.2d 947, 70 Cal. Rptr. 2d 850.

Facts. Edwin Winslow Bennett was arrested on September 27, 1989 for the murder of James Busher. Later that day, a law enforcement officer telephoned the manager of the motel where the defendant resided and asked her to deny entry to the room without police authorization. The manager complied. A law enforcement officer entered the room the next day, where he saw the rifle that was later revealed as the murder weapon. A search warrant was eventually obtained for the room, but the affidavit did not mention the initial search. Thereafter, the gun was seized.

At trial, the defendant's attorneys sought to exclude the rifle on the basis that entry into the motel room was an illegal search. The rifle was admitted into evidence under the inevitable discovery doctrine, and the defendant was convicted of first degree murder. After his conviction, the defendant filed a petition for writ of habeas corpus in the court of appeal. The petition claimed attorney incompetency because the defendant's attorneys did not seek to suppress the gun as the fruit of the unlawful seizure of the motel room. The court of appeal issued an order to show cause in the lower court. The Orange County Superior Court denied the petition on the basis that the gun would have been inevitably discovered. The defendant filed a second petition for writ of habeas corpus on the same grounds. The court of appeal granted the petition and set aside the conviction.

The court of appeal held that the motel manager's refusal to permit entry into the motel room, upon instruction from the law enforcement officer, was an unlawful seizure. The gun, therefore, was "the tainted fruit of this illegal seizure." The court of appeal also held that the defendant was denied effective representation of counsel because his attorneys did not challenge the propriety of the seizure. The Supreme Court of California granted certiorari to determine whether the defendant's motel room was illegally seized when the investigator instructed the motel manager to refuse access to the room.

Holding. The supreme court reversed the decision of the court of appeal, holding that the defendant was not denied effective representation of counsel because a motion to suppress the rifle based on the seizure of the room would have lacked merit, and therefore, the defendant's attorneys were not incompetent in failing to raise the issue. The motion would have failed, the court said, because the seizure of the motel room did not violate the defendant's constitutional rights.

Warrantless entry is typically illegal, with a few delineated exceptions. Some courts permit the police to enter and secure a premises where there is probable cause that contraband or evidence of a crime is present at the location, and exigent circumstances indicate the evidence will likely be destroyed or removed. In this

case, however, the police did not enter the motel room to secure it, but asked the motel manager to refuse entry to any unauthorized person. This request and subsequent obedience from the motel manager constituted a seizure under the Fourth Amendment because it interfered with the defendant's possessory interest in the room. A seizure is unlawful if it is unreasonable. The reasonableness standard focuses on the nature of the interest upon which law enforcement officials interfered.

The court found that the defendant had a possessory interest in the motel room, but it was attenuated due to his arrest. The police did not restrict the defendant from accessing the room. Instead, individuals given the defendant's permission were denied entry. Furthermore, the seizure was temporary, and thus comparable to situations where persons may be temporarily detained by law enforcement personnel. Police officers need only "reasonable suspicion" to temporarily seize an individual they suspect is involved in criminal activity. Circumstances where police fear the imminent destruction or confiscation of evidence is analogous to the situation where police are concerned with a fleeing criminal or with one about to commit a crime. Accordingly, police officers need only "reasonable suspicion" that contraband or crime evidence is on the premises to justify a limited interference with one's possessory interest in a dwelling.

Allowing law enforcement officers to temporarily seize premises upon "reasonable suspicion" preserves evidence and furthers the goal of the Fourth Amendment: "to prevent the government from unnecessarily intruding on an individual's privacy rights." A temporary seizure promotes this goal because it prevents warrantless searches where there is no probable cause. However, if police officers develop probable cause during the seizure, a warrant may be obtained to lawfully search the dwelling.

The court's "conclusion [sought] to minimize the intrusion on the individual's Fourth Amendment interests, while at the same time recognizing that the 'operational necessities' of police investigation justify a limited and temporary form of seizure based on less than probable cause." The law enforcement officers' seizure of the defendant's motel room, therefore, was reasonable. Additionally, the court held that the eighteen hour seizure of the motel room was reasonable because the defendant was in police custody, but reserved the question of whether such a period of time would be reasonable if the occupant was not in custody.

Alternatively, the supreme court held that even if the seizure was unlawful, the rifle would not have been suppressed because the police had an independent source for discovery of the rifle. Relying on the United States Supreme Court decision in *Segura v. United States*, 468 U.S. 796 (1984), the court held that the officers searched the defendant's motel room under authority granted from a valid search warrant that did not mention the seizure of the motel room. "[T]he warrant . . . was sufficient to dissipate the taint of any illegality." The fact that someone authorized

by the defendant to enter the motel room to collect his belongings would have prevented discovery of the rifle is not pertinent to the "independent source" doctrine.

The defendant's attorneys were, therefore, not incompetent in failing to raise the issue of the motel room seizure in their motion to suppress the rifle.

References

Statutes and Legislative History:

U.S. CONST. amend. IV ("[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures").

U.S. CONST. amend. VI ("[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.").

CAL. CONST. art. 1, § 13 ("[t]he right of the people to be secure . . . against unreasonable seizures and searches").

CAL. CONST. art. 1, § 15 ("[t]he defendant in a criminal case has the right . . . to have the assistance of counsel for the defendant's defense").

Case Law:

Soldal v. Cook County, 506 U.S. 56, 66 n.9 (1992) ("When 'operational necessities' exist, seizures can be justified on less than probable cause.").

Alabama v. White, 496 U.S. 325, 329-31 (1990) (explaining the reasonable suspicion standard in the context of a temporary seizure of the person).

Segura v. United States, 468 U.S. 796, 814 (1984) (holding the "independent source" doctrine applicable where a warrant is not based on illegal entry).

United States v. Rubin, 474 F.2d 262, 268-69 (3d Cir. 1973) (providing factors for determining when warrantless entry is justified where there is probable cause that contraband or other evidence is on the premises).

In re Wilson, 3 Cal. 4th 945, 950, 838 P.2d 1222, 13 Cal. Rptr. 2d 269 (1992) (holding that an individual has been denied effective assistance of counsel where "there is a reasonable probability that, but for counsel's failings, the result would have been more favorable" to the defendant).

Legal Texts:

3 WAYNE R. LAFAVE, SEARCH AND SEIZURE §6.5(c) (3d ed. 1996) (discussing temporary seizures of dwellings where reasonable suspicion of contraband or other crime evidence is present).

20 CAL. JUR. 3D *Criminal Law* § 2514 (1985) (explaining that securing a dwelling is not necessarily an unreasonable seizure).

20 CAL. JUR. 3D *Criminal Law* § 2535 (1985) (providing examples of exigent circumstances that justify warrantless entry which includes "the imminent destruction, removal, or concealment of evidence").

4 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW § 2345 (1989) (explaining that premises may be secured while police wait for a warrant).

4 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW § 2373 (1989) (discussing warrantless entry where there is a fear that evidence will be lost or destroyed).

Law Review and Journal Articles:

Jeremy J. Calsyn et al., *Investigation and Police Practices: Warrantless Searches and Seizures*, 86 GEO. L.J. 1214 (1998) (discussing where warrantless searches and seizures are justified).

Steven G. Davison, *Warrantless Investigative Seizures of Real and Tangible Personal Property by Law Enforcement Officers*, 25 AM. CRIM. L. REV. 577 (1987) (discussing situations where police officers may secure premises "pending issuance of a search warrant").

Barbara C. Salken, *Balancing Exigency and Privacy in Warrantless Searches to Prevent Destruction of Evidence: The Need for a Rule*, 39 HASTINGS L.J. 283 (1987) (surveying cases dealing with warrantless entry where officers fear destruction of evidence).

Note, *Police Practices and the Threatened Destruction of Tangible Evidence*, 84 HARV. L. REV. 1465 (1971) (advocating the impoundment of dwellings to prevent the destruction of evidence).

PATRICIA CIRUCCI

F. The trier of fact may consider an appellate opinion, in general, as part of the record of conviction when determining whether a prior conviction qualifies under the sentencing scheme at issue. The court must perform an ad hoc analysis based on the facts of the case to determine the probative value of the appellate opinion.

People v. Woodell, Supreme Court of California, Decided February 11, 1998, 17 Cal. 4th 448, 950 P.2d 85, 71 Cal. Rptr. 2d 241.

Facts. The California Legislature mandates longer prison sentences for individuals with one or more prior serious or violent felony convictions, or "strikes." The State of California convicted the appellant, Woodell, of burglary in the first degree. During the trial, the prosecution offered documents stating the appellant's prior record of convictions in the State of North Carolina, including an indictment and guilty plea to assault with a deadly weapon inflicting serious injury. The plea agreement lacked many substantive facts of the crime. Normally the trial record contains such facts. Over protest from the appellant, the court also admitted the appellate opinion of the North Carolina Court of Appeals on the subsequent appeal from the guilty plea to assault with a deadly weapon. The prosecution offered the appellate opinion to show the appellant had personally used the deadly weapon, a necessary statutory element to prove a prior strike when the conviction hails from another jurisdiction. The jury found the appellant guilty of burglary and affirmed the previous assault conviction as a strike. As such, the court sentenced the appellant under a "prior strike" sentencing scheme and mandated the appellant to prison for thirty-five years to life.

The appellant sought relief from the court of appeal, which allowed the appellate opinion in the case at bar as a supplement to explain the indictment and guilty plea. The court of appeal further determined that normally the prior record of conviction would not contain the appellate opinion and thus could not be offered by the State of California. The California Supreme Court granted review to consider whether the record of conviction contained the appellate opinion.

Holding. Affirming the ultimate decision of the court of appeal, the California Supreme Court held that the trier of fact may consider an appellate opinion, in general, as part of the record of conviction when determining whether a prior conviction qualifies under the sentencing scheme at issue. The court must perform an ad hoc analysis based on the facts of the case to determine the probative value of the appellate opinion.

Although the supreme court previously held that the trier of fact may look to the entire record of conviction to determine the truth of the allegation, and that such a rule applies to convictions from other jurisdictions, the court never determined what

composed the "entire record." The court analogized the case at bar with a recent case to conclude that the entire record included the appellate opinion. The court reasoned that the exclusion of appellate opinions would frustrate the court's goal of efficiency. If the appellate opinion expedites justice then it should be admissible to assist the trier of fact. In addition, the court noted that the inclusion of appellate opinions would benefit the trier of fact to explain the previous conviction where the trial record lacked crucial information, such as in the case at bar. The court also recognized that not all appellate opinions would be probative as to a particular issue. As such, the court explained that the trier of fact must perform an ad hoc analysis of the facts to determine the probative value of the appellate opinion.

Consequently, the supreme court affirmed the ultimate judgment of the court of appeal. The court of appeal admitted the appellate opinion as a supplemental explanation of the prior trial record but not because it concluded that the record contained the appellate opinion. The court explained that such a holding failed to follow common sense. The court noted that the appellate opinion often serves as the definitive answer, affirming or reversing the trial court, to the truth of a previous conviction. Thus, the record of conviction should logically contain all matters of record, including appellate opinions, until the court reaches a final judgment.

Accordingly, the court rejected the appellant's argument to exclude the appellate opinion when offering it to prove the truth of a prior alleged conviction. The court reasoned that because the defendant possessed the power to offer the appellate opinion to prove the decision invalid, the prosecution may offer the appellate opinion as part of the record of conviction to prove the truth of a prior conviction.

REFERENCES

Statutes and Legislative History:

CAL. PENAL CODE § 667 (a) (1) (West 1988 & Supp. 1998) (stating that an enhanced sentence shall be imposed if the individual has a prior conviction for a serious or violent felony).

CAL. PENAL CODE § 667 (d) (2) (West 1988 & Supp. 1998) (imposing a strike for a previous felony conviction from another jurisdiction in which all of the elements of the crime were the same in both jurisdictions).

CAL. PENAL CODE § 1170.12 (West Supp. 1998) (determining that prior felony convictions or pleas warrant the enhancement of sentencing).

Case Law:

People v. Hazelton, 14 Cal. 4th 101, 926 P.2d 423, 58 Cal. Rptr. 2d 443 (1996) (discussing longer sentences for individuals convicted of previous serious or violent felonies).

People v. Myers, 5 Cal. 4th 1193, 858 P.2d 301, 22 Cal. Rptr. 2d 911 (1993) (holding that *People v. Guerrero* applies to convictions from other jurisdictions).

People v. Guerrero, 44 Cal. 3d 343, 748 P.2d 1150, 243 Cal. Rptr. 688 (1988) (concluding that the trier of fact may look to the entire record of the conviction to determine the truth of a prior conviction allegation, but "no further").

Legal Texts:

21 CAL. JUR. 3D *Criminal Law* § 2760 (1985 & Supp. 1998) (discussing prior convictions and the requirements needed to enhance sentencing).

22 CAL. JUR. 3D *Criminal Law* §§ 3362-3391 (1985 & Supp. 1998) (generally reviewing the enhancement of punishment for various crimes).

22 CAL. JUR. 3D *Criminal Law* § 3380 (1985 & Supp. 1998) (discussing crimes committed in other jurisdictions and the enhancement of punishment).

3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crimes* § 1515A (2d ed. Supp. 1998) (generally discussing the three strikes law in the context of prior serious or violent felonies).

3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crimes* § 1521 (2d ed. 1989 & Supp. 1998) (discussing convictions for prior felonies committed in another jurisdiction).

Law Review and Journal Articles:

Lisa E. Cowart, Comment, *Legislative Prerogative vs. Judicial Discretion: California's Three Strikes Law Takes a Hit*, 47 DEPAUL L. REV. 615 (1998) (examining in-depth the history, application, and validity of California's three strikes legislation).

Ilene M. Shinbein, Note, *"Three Strikes and You Are Out": A Good Political Slogan to Reduce Crime, But a Failure in Its Application*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 175 (1996) (discussing the application of three strikes legislation in general and its apparent failure).

Michael Vitiello, *Three Strikes: Can We Return To Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395 (1997) (analyzing the history behind three strikes legislation and the current state of the law in California contrasted with the law of various other jurisdictions).

Keith C. Owens, Comment, *California's "Three Strikes" Debacle: A Volatile Mixture of Fear, Vengeance, and Demagoguery Will Unravel the Criminal Justice System and Bring California to Its Knees*, 25 SW. U. L. REV. 129 (1995) (discussing California's three strikes law and the potential downfall of the state).

Mark W. Owens, Note, *California's Three Strikes Law: Desperate Times Require Desperate Measures-But Will It Work?*, 26 PAC. L.J. 881 (1995) (analyzing the legal and economic ramifications of Penal Code section 667).

William M. Thornbury, *What Is the Meaning of Three Strikes and You Are Out Legislation?*, 26 U. WEST L.A. L. REV. 303 (1995) (reviewing the application of California's three strikes legislation).

JESSE CARYL

V. DELINQUENT, DEPENDENT, AND NEGLIGENT CHILDREN

Courts have authority to create hearsay exceptions not established in the California Code of Evidence; therefore, the "child dependency hearsay exception" created in a prior judicial proceeding is a valid exception to the hearsay rule. However, this exception must be modified to include a valid determination of reliability based on (1) an examination of the time, circumstances, and content of the statement which might provide specific indicia of reliability, (2) an opportunity for cross-examination of the child declarant or independent corroboration of the statement, and (3) adequate notice of intended hearsay use given to interested parties. Furthermore, a finding of testimonial incompetence of the child is not a categorical bar to the admission of the child's prior statement.

In re Cindy L. v. Edgar L., Supreme Court of California, Decided December 29, 1997, 17 Cal. 4th 15, 947 P.2d 1340, 69 Cal. Rptr. 2d 803.

Facts. In August of 1994, proceedings were initiated pursuant to section 300 of the California Welfare and Institution Code to have Cindy L. (Cindy), a four-year-old girl, declared a dependant child of the court. These proceedings were initiated when Cindy's preschool alerted the Los Angeles County Department of Children and Family of possible sexual abuse. Yolanda Herrera, a teacher's assistant at Cindy's school, testified that she noticed Cindy "lying on her back, with her legs spread open touching her vagina underneath the side of her underwear using both hands." Herrera further testified that she asked Cindy what she was doing and Cindy replied, "my father always touches me right here." Cindy also made consistent statements to two social workers and a police investigator. However, at the dependancy hearing, Cindy was nonresponsive to questions and was not competent as a witness because the court could not determine that Cindy possessed the ability to understand the duty to tell the truth. Despite this finding of incompetence, the court determined that Cindy's hearsay statements to Herrera were admissible in the hearing. Based on this testimony, and a medical report filed by an examining physician that corroborated Cindy's statements, the court determined that Edgar had abused Cindy and that there was a risk of continued sexual abuse.

Edgar appealed and contended that use of hearsay statements under the "child dependency hearsay exception" is inappropriate where the child is found incompetent to testify at trial. The court of appeal affirmed the lower court's decision, holding that "the child dependency . . . exception probes for unreflective and spontaneous truth-telling, and is not founded on the declarant's regard for the duty of truth-telling." The Supreme Court of California granted review to resolve two

issues: (1) whether the "child dependancy hearsay exception" created by the judiciary rather than the legislature is a valid exception to the hearsay rule, and (2) whether a finding that the child is incompetent is a conclusive bar to the admissibility of statements under this exception.

Holding. Affirming the decision of the court of appeal, the California Supreme Court held that the "child dependancy hearsay exception" is a valid exception, and that finding the declarant incompetent to testify at the dependancy hearing does not bar admission of statements under the "child dependancy" exception.

In order to prove the validity of the "child dependancy hearsay exception," which was created in a prior judicial decision, the court turned to the language and legislative history of sections 1200 and 160 of the California Code of Evidence. The court noted that section 1200 states that "hearsay evidence is inadmissible '[e]xcept as provided by law.'" Because section 160 of the code defines the term "law" as including "constitutional, statutory, and decisional law," the court concluded that section 1200 granted courts authority to create exceptions to the hearsay rule. The court supported this analysis by turning to the legislative history of section 1200. Specifically, the court cited a comment on section 1200 adopted by the Senate Committee on the Judiciary that stated, "[o]ther exceptions [to the hearsay rule] may be found in other statutes or in decisional law." The court determined that the judicial power to create hearsay exceptions does exist.

However, the court warned that this judicial power should be employed with caution. This power may only be used to create new exceptions upon a showing of "substantial need." The court determined that the "child dependancy hearsay exception" is valid because it is supported by substantial need. In light of the difficulties in obtaining physical evidence or testimony in child abuse cases, the court determined that this exception prevented the exclusion of "significant, reliable evidence required for the juvenile court to assert its jurisdiction over the child and to ultimately protect him or her from an abusive family relationship."

Although the court determined that this exception is valid, it noted that the "child dependancy" exception "needs to be clarified and augmented in order to better safeguard the reliability of a child's hearsay statements introduced in a dependency proceeding." The court adopted three requirements for the admission of hearsay statements in child dependency hearings: (1) the court must find that the time, content and circumstances of the statement provide sufficient indicia of reliability; (2) a child must either be available for cross-examination or there must be evidence of child sexual abuse that corroborates the statement made by the child; and (3) other interested parties must have adequate notice of the public agency's intention to introduce the hearsay statement so as to contest it. The court determined that if these three requirements are satisfied, then hearsay statements may be admitted in dependency hearings under the "child dependency hearsay exception."

REFERENCES

Statutes and Legislative History:

CAL. EVID. CODE. § 1200 (West 1997) (hearsay evidence is inadmissible "except as provided by law").

CAL. EVID. CODE. § 160 (West 1997) (defining meaning of the term "law" in code).

Senate Comm. on Judiciary, comment on Ass'm. Bill No. 3212 (1965 Reg. Sess.) reprinted at 29B pt. 4 ANN. EVID. CODE (West 1995) ("other [hearsay] exceptions may be found in decisional law").

Case Law:

Idaho v. Wright, 497 U.S. 805 (1990) (describing factors to be considered in order to make a determination of reliability in hearsay analysis).

In re Carmen O., 28 Cal. App. 4th 908, 33 Cal. Rptr. 2d 848 (1994) (creating the "child dependency hearsay exception").

In re Malinda S., 51 Cal. 3d 368, 795 P.2d 1244, 272 Cal. Rptr. 787 (1990) ("hearsay exceptions may be found in decisional law").

People v. Spriggs, 60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964) (using the authority to establish new hearsay exceptions to admit statements against penal interest).

Legal Texts:

21 CAL. JUR. 3D *Criminal Law* §§ 3145-3146 (1985 & Supp. 1997) (generally discussing exceptions to the hearsay rule).

21 CAL. JUR. 3D *Criminal Law* § 3143 (1985 & Supp. 1997) (discussing hearsay exceptions for declarations made by victims of crime).

31 CAL. JUR. 3D *Evidence* § 310.7 (1985 & Supp. 1997) (explaining that statements of physical abuse are not inadmissible under the hearsay rule if certain requirements are satisfied).

2 B.E. WITKIN, CALIFORNIA EVIDENCE, *Witnesses* § 1053 (3d ed. 1986) (discussing competency issues related to the testimony of children).

1 B.E. WITKIN, CALIFORNIA EVIDENCE, *The Hearsay Rule* § 711 (3d ed. 1986) (describing exceptions to the hearsay rule in cases involving prior statements of a sex crime victim).

Law Review and Journal Articles:

Irene S. Kreitzer, *Who Can Speak For the Child: Hearsay Exceptions in Child Sexual Abuse Cases*, 13 CRIM. JUST. J. 213 (1992) (analyzing hearsay exceptions as used in child abuse cases).

Krista MacNevin Jee, *Hearsay Exceptions in Child Abuse Cases: Have the Courts and Legislatures Really Considered the Child?*, 19 WHITTIER L. REV. 559 (Spring 1998) (focusing on the balance between the child's interest in abuse cases and the interests of the accused as they relate to the admission of hearsay statements).

Robert G. Marks, *Should We Believe the People Who Believe the Children?: The Need for a New Sexual Abuse Tender Years Hearsay Exception Statute*, 32 HARV. J. ON LEGIS. 207 (Winter 1995) (examining state approaches to admission of hearsay in child abuse hearings).

John E.B. Myers, *A Decade of International Legal Reform Regarding Child Abuse Investigation and Litigation: Steps Toward a Child Witness Code*, 28 PAC. L.J. 169 (Fall 1996) (examining global approaches to testimony of children in child abuse cases and encouraging international reform based on a uniform child witness code).

Roger C. Park, *Hearsay, Dead or Alive?*, 40 ARIZ. L. REV. 647 (Summer1998) (discussing weakening of the hearsay rule based on new exceptions like the "child dependency exception").

ROBERT MCFARLAND

VI. DISSOLUTION OF MARRIAGE

The imposition of contempt sanctions against a parent who refuses to pay child support is not a form of involuntary servitude proscribed by the United States and California constitutions because requiring a parent to seek some sort of employment does not bind the parent to any one type of employment or employer, nor is the imposition of contempt sanctions for failure to pay child support unconstitutional as an imprisonment for debt because failure to pay falls under an implied fraud exception to the proscription against imprisonment for debt.

Moss v. Superior Ct., Supreme Court of California, Decided February 2, 1998, 17 Cal. 4th 396, 950 P.2d 59, 71 Cal. Rptr. 2d 215.

Facts. In June of 1995, the defendant was ordered to pay his ex-wife child support payments on a semi-monthly basis. After a year had passed, the defendant had failed to pay twenty-four payments in the amount of $5,210. At the time the child support order was made, the court was aware that the defendant was unemployed, but based its support award on a projected monthly income of $1,671 per month.

On June 22, 1995, a contempt declaration was issued by the court for twenty-four separate contempt violations, one for each missed payment. At the contempt hearing, the defendant presented evidence of his inability to comply with the support order, assuming that once any evidence of inability was raised, the burden would be on the defendant's ex-wife to prove that the defendant could pay the support. The ex-wife contended that inability to comply was an affirmative defense in which the defendant had the burden of proving that he was unable to comply.

The trial court held that the inability to comply with the support order was an affirmative defense in which the burden of proving inability to comply was on the defendant. The court also held that evidence was presented to show that the defendant did receive income from some source, and that the defendant's failure to work did not indicate an inability to pay the support. Based upon this, the court held that the defendant was able to comply with the support order and was guilty of the twenty-four contempt counts.

Prior to sentencing, the court allowed the defendant to appeal the contempt finding. The court of appeal stayed the appeal pending the trial court's imposition of sentence. The trial court imposed sentence on six of the twenty-four counts, imposing five days in jail and ten hours community service for each of the six counts. The court of appeal then heard the defendant's petition. On appeal the defendant argued that his ex-wife had failed to prove that he had any resources with which to comply with the support order. The defendant also argued that a finding of contempt may not be based on the defendant's ability to earn, citing the

longstanding rule that forcing a party to seek employment to pay court-ordered support is a form of involuntary servitude barred by the United States and California constitutions. The court of appeal overruled the trial court, holding that the defendant could not be held in contempt of court based upon his ability to earn. The California Supreme Court then granted review to determine if a finding of contempt for failure to pay court-ordered support is constitutionally impermissible if that finding is based upon the parent's ability to earn.

Holding. The supreme court affirmed the decision of the court of appeal, but overturned *Ex parte Todd*, 119 Cal. 57, 50 P. 1071 (1897), the longstanding case holding that forcing a party to seek employment to pay court-ordered support is a form of involuntary servitude impermissible under the United States and California constitutions. The court held that requiring a person to comply with court-ordered support by holding that person in contempt was not a form of impermissible involuntary servitude.

The court reasoned that the obligation of a parent to pay child-support is not comparable to involuntary servitude. Moreover, the court recognized that the United States Constitution did not proscribe enforced labor as punishment for a crime. The court also reasoned that the duty to pay child support was an obligation as important as compulsory military service or jury duty.

The court also reasoned that a court requiring a person to seek some sort of employment to pay a financial obligation does not rise to the level of involuntary servitude because it imposes no control on the type of job that person seeks or with whom he is employed. The court further reasoned that a person who is obligated to seek employment to pay a court-ordered financial obligation is not only free to seek how and with whom he is employed, but also to quit his employment at any time to seek employment elsewhere. The court concluded that such freedoms were not indicative of involuntary servitude.

The court also held that a contempt penalty based upon a party's inability to pay court ordered child support was not an impermissible imprisonment for a debt. The court reasoned that a contempt order based upon an inability to pay child support was a criminal contempt penalty, invoked specifically for the party's failure to yield to the court's authority. The court noted that imprisonment for failure to pay a debt was barred by the United States and California constitutions, but imprisonment for a crime was permissible.

In analyzing whether the contempt order was an imprisonment for a debt or imprisonment for a crime, the court reasoned that, in the specific case, the defendant's failure to seek employment was a willful attempt to avoid compliance with the court's order. Such a willful defiance was a form of implied fraud. The court reasoned that the contempt order was to punish the defendant for his implied fraud, and was therefore criminal rather than an imprisonment for a debt. The court also held that the inability to pay is an affirmative defense to a contempt charge, and thus the defendant carries the burden of proving his inability to pay the court-ordered support.

However, the court affirmed the decision of the court of appeal, holding that its overturning of *Todd* was prospective because both lower courts had relied on *Todd* as controlling with regard to child-support orders at the time of their rulings. The supreme court also held that the defendant had no notice that *Todd* was not controlling, and thus had failed to even attempt to prove his affirmative defense of inability to pay.

REFERENCES

Statutes and Legislative History:

CAL. CIV. CODE § 1209 (West 1982 & Supp. 1998) (defining conduct that will be considered contempt of court).

CAL. CIV. CODE § 1218 (West 1982 & Supp. 1998) (defining the maximum penalty for a single contempt violation as a fine of no more than $1000 or five days imprisonment, or both).

CAL. CIV. CODE § 1218.5 (West 1982 & Supp. 1998) (allowing the court to find non-paying support parents in contempt of court for each month they fail to pay support).

CAL. FAM. CODE § 290 (West 1994) (enabling a court to enforce its orders through contempt penalties).

CAL. FAM. CODE § 4058 (West 1994 & Supp. 1998) (allowing the court to consider the income of a support-paying parent's spouse where the support paying parent intentionally reduces income by quitting work or by failing to seek employment).

CAL. PENAL CODE § 166(a)(4) (West 1988 & Supp. 1998) (defining conduct which will be considered criminal contempt of court).

Case Law:

Ex parte Todd, 119 Cal. 57, 50 P. 1071 (1897), *overturned by* Moss v. Superior Ct., 17 Cal. 4th 396, 950 P.2d 59, 71 Cal. Rptr. 2d 215 (1998) (holding that the court cannot compel a man to seek employment in order to pay child support).

Ex parte Karlson, 160 Cal. 378, 117 P. 447 (1911) (holding that where a fine is imposed as a punishment for contempt, the court has the power to enforce its payment by imprisonment until paid, and the imprisonment may exceed five days).

H.J. Heinz Co. v. Superior Ct., 42 Cal. 2d 164, 266 P.2d 5 (1954) (stating that statutes authorizing fines or imprisonment as penalties for contempt establish limits within which courts may punish contempt).

Morelli v. Superior Ct., 1 Cal. 3d 328, 461 P.2d 655, 82 Cal. Rptr. 375 (1969) (defining the nature of contempt penalties such that where the object of the contempt penalty is to protect the rights of the litigants, it is to be considered a civil penalty, but where the object is to protect the dignity or authority of the court, it is to be considered a criminal penalty, regardless of whether it arose in a civil or criminal case).

Legal Texts:

1 CAL. JUR. 3D *Actions* § 19 (1996) (generally discussing the classification of contempt as criminal or civil).

14 CAL. JUR. 3D *Contempt* § 20 (1974) (generally discussing what constitutes a separate act of contempt).

14 CAL. JUR. 3D *Contempt* § 32 (1974) (generally discussing when inability by a party to comply with a court order will disqualify a party from being charged with contempt).

14 CAL. JUR. 3D *Contempt* § 44 (1974 & Supp. 1998) (generally discussing the limitations on contempt penalties).

19 CAL. JUR. 3D *Criminal Law* § 1747 (1984 & Supp. 1998) (generally discussing what constitutes criminal contempt).

1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Introduction to Crimes* § 13 (2d ed. 1988 & Supp. 1998) (defining contempt proceedings as quasi-criminal proceedings).

2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against Governmental Authority* § 1141 (2d ed. 1988 & Supp. 1998) (generally discussing contempt).

Law Review and Journal Articles:

Sean Arther, *Civil Procedure; Violation of Contempt Orders, Attorney's Fees*, 26 PAC. L.J. 332 (1995) (discussing amendments to Cal. Civ. Proc. Code § 1218 allowing courts to assess against persons found in contempt fees above the statutory $1000 limit).

Marsha Garrison, *An Evaluation of Two Models of Parental Obligation*, 86 CAL. L. REV. 41 (1998) (generally discussing enforcement of parental duties to children through child support laws and contempt penalties).

Stacey A. Kielma, *Civil Procedure; Contempt Orders*, 25 PAC. L.J. 461 (1994) (discussing amendments to Cal. Civ. Proc. Code § 1218 calling for fines in excess of the statutory $1000 in contempt proceedings when community service is ordered as part of the contempt penalty and the fines plus the community service administrative fees exceed $1000).

Ilse Nehring, *"Throwaway Rights": Empowering a Forgotten Minority*, 18 WHITTIER L. REV. 767 (1997) (generally discussing the legal and moral duty of a parent to support a minor child, and specifically discussing the rise of the parental rights movement).

JOSHUA DALE

VII. EMPLOYER AND EMPLOYEE

A jury's role in a trial for breach of an implied employment contract, where the employee can be discharged for good cause only, is to decide whether the employer acted in good faith and had reasonable grounds for believing misconduct occurred.

Cotran v. Rollins Hudig Hall Int'l, Inc., Supreme Court of California, Decided January 5, 1998, 17 Cal. 4th 93, 948 P.2d 412, 69 Cal. Rptr. 2d 900.

Facts. Defendant, Rollins Hudig Hall International, Inc. (Rollins), fired Ralph Cotran, the plaintiff, as senior vice-president and western regional international manager of Rollins' West Coast international office. Defendant fired Cotran following an investigation of allegations that Cotran had sexually harassed two employees. Based on the investigation and interviews with Rollins' employees, Susan Held, Rollins' manager for equal employment opportunity compliance, concluded it was more likely than not that the sexual harassment occurred. Fred Feldman, Rollins' president, fired Cotran based on Held's investigative report, and on affidavits of employees.

Cotran claimed that Rollins breached an implied employment contract not to terminate employment except for good or just cause. Rollins defended the claim on the ground that Rollins' decision to terminate Cotran was reached honestly and in good faith. The trial judge rejected Rollins' defense and stated that the case was basically a contract dispute and that Rollins must prove that Cotran actually committed the acts. Therefore, the trial judge instructed the jury to determine whether the acts of sexual harassment actually occurred. The jury determined that the sexual harassment did not occur and thus returned a verdict for Cotran. The court of appeal reversed and the California Supreme Court granted review to determine the jury's role in an action for breach of an implied agreement not to be dismissed except for "good cause" when the employee was dismissed for misconduct.

Holding. Affirming the decision of the court of appeal, the California Supreme Court held that the jury's role in an action for breach of an implied contract not to be dismissed except for "good cause" was to "assess the objective reasonableness of the employer's factual determination of misconduct." Therefore, the court held that the jury's role is not to determine whether the misconduct actually occurred, but rather, whether the employer's decision to terminate was based on "fair and honest reasons, . . . that are not trivial, arbitrary or capricious, unrelated to business needs or goals . . . ."

The court reasoned that in determining whether good cause exists, there must be a balance between an employer's interest in efficient personnel decisions and an employee's interest in continuing employment. A jury does not have the requisite knowledge of the everyday realities of the workplace because of the jury's relative remoteness from the everyday realities of the workplace. If an employer were required to have a written confession or an eyewitness account of the misconduct, then the workplace would turn into an "adjudicatory arena." Consequently, the supreme court rejected the trial judge's ruling that a breach of an implied employment contract not to be dismissed except for "good cause" is a contract issue and therefore the defendant must prove the misconduct occurred. The court explained that to require an employer to prove that a misconduct actually occurred would in turn hamper the employer's ability to run an efficient and profitable business.

Accordingly, the supreme court stated that the case should be retried and that the critical question for the jury was whether at the time the defendant made the decision to terminate Cotran, the defendant had reasonable grounds for believing Cotran had sexually harassed the other employees based on an appropriate investigation.

REFERENCES

Statutes and Legislative History:

CAL. LABOR CODE § 2924 (West 1989) ("Employment for a specified term; grounds for termination by employer").

CAL. LABOR CODE § 3005 (West 1989).

Case Law:

Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) (holding that a jury's role is to decide whether an employer acted with "a fair and honest cause or reason, regulated by good faith").

Scott v. Pacific Gas & Elec. Co., 11 Cal. 4th 454, 904 P.2d 834, 46 Cal. Rptr. 2d 427 (1995) (stating that reasons that are "trivial, capricious, unrelated to business needs or goals, or pretextual" are not good or just cause for termination).

Simpson v. Western Graphics Corp., 643 P.2d 1276 (Or. 1982) (holding that absent an implied or express agreement that the employer contracted away its fact-finding

prerogative to determine whether just cause exists for termination of employment, the court will not infer it).

Southwest Gas v. Vargas, 901 P.2d 693 (Nev. 1995) (rejecting the argument that the jury should review de novo the factual basis for an employer's decision to terminate for just cause).

Legal Texts:

29 CAL. JUR. 3D *Employer & Employee* § 59 (1986) (generally discussing discharge of an employee).

29 CAL. JUR. 3D *Employer & Employee* § 62 (1986) (generally discussing grounds for discharge of an employee).

29 CAL. JUR. 3D *Employer & Employee* § 64 (1986) (discussing the requirements for an employment contract for termination based on good cause).

2 B.E. WITKIN, SUMMARY of CALIFORNIA LAW, *Agency & Employment* § 156 (9th ed. 1987) (generally discussing discharge of employment for cause).

2 B.E. WITKIN, SUMMARY of CALIFORNIA LAW, *Agency & Employment* § 184E (9th ed. 1987 & Supp. 1998) (discussing theories for an action for wrongful termination based on breach of an implied in fact contract).

Law Review and Journal Articles:

Gary Trachten, *Wrongful Termination Claims: What Plaintiffs and Defendants Have To Know*, 581 PLI/LIT 9 (1998) (discussing the meaning of good cause in employment contract context).

Rod M. Fliegel, Comment, *Reflections on California's "At Will" Employment Agreement Jurisprudence*, 37 SANTA CLARA L. REV. 1, 8-12 (1996) (discussing termination of employment based on good cause).

Michael D. Fabiano, Note, *The Meaning of Just Cause for Termination When an Employer Alleges Misconduct and the Employee Denies It*, 44 HASTINGS L.J. 399 (1993) (examining what a private employer must demonstrate in order to lawfully terminate a just-cause protected employee).

Wendi J. Delmendo, Comment, *Determining Just Cause: An Equitable Solution for the Workplace*, 66 WASH. L. REV. 831 (1991) (discussing the need to adopt a standard that requires a jury to balance employer and employee interests).

Carl F. Schwarze, Comment, *Understanding the Just Cause Defense*, 65 U. DET. L. REV. 527 (1988) (discussing the definition of just cause in wrongful discharge cases).

ANN KIM

Site investigation expenses constitute defense costs that the insurer incurs in fulfilling its duty to defend if: (1) the site investigation is conducted between tender of the defense and conclusion of the action; (2) the site investigation constitutes a reasonable and necessary effort to avoid or at least minimize liability; and (3) the site investigation expenses are reasonable and necessary for that purpose. Additionally, defense costs may be allocated to the insured if the costs related to a claim that is not even potentially covered under the insurance policy.

Aerojet-General Corp. v. Transport Indem. Co., Supreme Court of California, Decided December 29, 1997, 17 Cal. 4th 38, 948 P.2d 909, 70 Cal. Rptr. 2d 118.

Facts. Through the course of Aerojet-General Corporation's (Aerojet) operations from the 1950s through the 1980s, Aerojet discharged hazardous substances into the environment. Since 1979, three actions instituted by either the United States or the State of California and 35 actions instituted by private parties were brought against Aerojet. Each action alleged that Aerojet's continuous discharge of hazardous substances polluted the surrounding environment and resulted in bodily injury and/or property damage.

From 1956 to 1975, Aerojet had comprehensive general liability insurance policies (commonly known as standard commercial general liability insurance policies) issued by various insurers, providing coverage for specified harm including bodily injury and/or property damage. From 1976 to 1984, Aerojet was covered by "fronting policies" issued by Insurance Company of North America (INA), providing that there was no duty on the part of INA to indemnify or defend. In 1982, Transportation Indemnity Company and Associated International Insurance Company (collectively Transportation Indemnity) filed a complaint for declaratory relief against various other insurers and their common insured, Aerojet, regarding the parties' rights and duties under the comprehensive general liability insurance policies. Specifically, Transportation Indemnity sought a declaration that it was not obligated to provide, nor was Aerojet entitled to receive, either indemnification or defense costs. Aerojet filed a cross-complaint against Transportation Indemnity and the other insurers (collectively the insurers), seeking declaratory relief. Later, in an amended cross-complaint, Aerojet sought a declaration that it was entitled to receive, and the insurers were obligated to provide, both indemnification and defense costs.

The trial court determined by jury that: (1) the insurers had no duty to indemnify because Aerojet intended or expected the harm caused by the pollution, (2) site investigation costs did not constitute defense costs, and (3) defense costs were allocated to Aerojet for the eight year period Aerojet was covered by the INA "fronting policies." The court of appeal affirmed the trial court's holdings that the insurers had no duty to indemnify and that defense costs incurred after Aerojet was

covered by fronting policies were properly allocated to Aerojet. However, the court of appeal reversed the lower court's judgment with respect to its determination that none of the site investigation costs were defense costs. The California Supreme Court granted review to determine: (1) whether site investigation expenses may constitute defense costs properly attributable to the insurer in fulfilling its duty to defend, and (2) whether defense costs may be allocated to the insured.

Holding. The California Supreme Court affirmed the decision of the court of appeal to the extent that it held that: (1) site investigation expenses may constitute defense costs that the insured must incur as a result of its duty to defend under the comprehensive general liability insurance policies and (2) defense costs might be allocated to the insured under such policies. However, the California Supreme Court reversed the lower court ruling to the extent that it held that defense costs should be allocated to the insured based on the time the "fronting policies" were in effect.

With respect to the site investigation expenses, the supreme court reasoned that under comprehensive general liability insurance policies, the insurer has a duty to defend the insured in any action brought against the insured that seeks damages for a covered claim. Because the insurance policies at issue covered harm for bodily injury and/or property damage, the court reasoned that site investigation expenses that include costs for determining the existence, nature, and effect of the harm caused by the discharge of hazardous substances may properly be defense expenses that the insurer must pay under its duty to defend. Therefore, the court determined that site investigation expenses constitute defense costs that the insurer incurs in fulfilling its duty to defend if: (1) the site investigation is conducted between tender of the defense and conclusion of the action; (2) the site investigation constitutes a reasonable and necessary effort to avoid or at least minimize liability; and (3) the site investigation expenses are reasonable and necessary for that purpose. Consequently, the court remanded the case to the court of appeal to determine if all of the stated requirements had been met, thereby creating an obligation on the part of the insurers to pay such defense costs.

Additionally, with respect to defense costs that may be allocated to the insured, the supreme court held that defense costs that can be allocated to a claim potentially covered, or at least partially covered, under a comprehensive general liability insurance policy cannot be allocated to the insured. Furthermore, the burden of proof is on the insurer to prove by a preponderance of the evidence that the defense costs are properly allocated to the insured. Because the claim at issue alleged that Aerojet continuously discharged hazardous substances that resulted in bodily injury and/or property damage, the court reasoned that the claim is at least potentially covered by the comprehensive general liability insurance policies. Therefore, the court concluded that the burden is on each of the insured to prove by a preponderance of the evidence that the claims presented by the federal government, the State

of California, and the private parties were not even potentially covered by the insurance policies. The court clearly held that if the specified harm may have potentially been caused, at least in part, within the insurer's covered policy period, the insurer has a duty to defend for all such periods during which the harm may possibly have resulted thereafter. Consequently, an insurer could only allocate defense costs to Aerojet for any part of the claim involving acts or omissions resulting in bodily harm or property damage caused either before the specific policy's inception or after the specific policy expired. Furthermore, the court determined that Aerojet's subsequent policy with INA in no way affected the insurers' obligations to Aerojet under their policies. The court remanded the case to the court of appeal for such determinations.

REFERENCES

Statutes and Legislative History:

42 U.S.C. § 9604 (a) (1) (1994) (the federal government may request or require a site investigation).

42 U.S.C. § 9607 (a) (1994) (when the federal government conducts a site investigation, the insured may be compelled to reimburse the government for the expenses incurred).

Case Law:

Buss v. Superior Ct., 16 Cal. 4th 35, 939 P.2d 766, 65 Cal. Rptr. 2d 366 (1997) (holding that when an action in which some of the claims are potentially covered by the policy and some are not, the insurer has a duty to defend the entire action).

AIU Ins. Co. v. Superior Ct., 51 Cal. 3d 807, 799 P.2d 1253, 274 Cal. Rptr. 820 (1990) (holding that the cost of site investigation expenses constitutes damages).

Montrose Chem. Corp. v. Admiralty Ins. Co., 10 Cal. 4th 287, 861 P.2d 1153, 24 Cal. Rptr. 2d 467 (1993) (holding that an insurer's duty to defend is broader than the duty to indemnify).

Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966) (concluding that an insurer is required to defend any claim where potential liability exists under the policy).

Legal Texts:

39 CAL. JUR. 3D *Insurance Contracts* § 555 (1996) (generally discussing an insurer's duty to defend).

39 CAL. JUR. 3D *Insurance Contracts* § 561 (1996) (discussing when an insurer's duty to defend is terminated).

39 CAL. JUR. 3D *Insurance Contracts* § 556 (1996) (discussing determination of an insurer's duty to defend).

6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1136 (1988 & Supp. 1998) (generally discussing the scope of an insurer's duty to defend a claim).

6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1142B (1988 & Supp. 1998) (discussing reimbursement of the insurer from the insured for uncovered claims).

6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1142C (1988 & Supp. 1998) (discussing the Aerojet decision and its holding that site investigation expenses may constitute defense costs).

Law Review and Journal Articles:

Eileen B. Eglin and Stephen D. Straus, *Classifying RI/FS Costs Under A Policy Of Comprehensive General Liability Insurance: Indemnity Or Defense?*, 5 FORDHAM ENV'T. L.J 385 (1994) (discussing an insurer's duty to defend under a comprehensive general liability insurance policy and the issue of whether site investigation costs may be included as defense costs).

Mark C. Raskoff, *Arguments Advanced By Insureds For Coverage Of Environmental Claims*, 22 PAC. L.J. 771 (1991) (discussing the scope of an insurer's duty to defend).

John H. Reaves, *The Insurer's Duty to Defend*, 17 CAL. LAWYER 54 (1997) (discussing the allocation of defense costs between the insurer and the insured).

Douglas R. Richmond, Comment, *Issues And Problems In "Other Insurance," Multiple Insurance, And Self-Insurance*, 22 PEPP. L. REV. 1373 (1995) (analyzing the different types of insurance policies).

Joseph S. Stuart, Comment, *Inadvertent Disclosure of Confidential Information: What Does A California Lawyer Need to Know?*, 37 SANTA CLARA L. REV. 547 (1997) (discussing how the *Aerojet* decision has influenced California lawyering practices).

JENNIFER LEWIS

IX. MUNICIPALITIES

California Vehicle Code section 40200.5(a), prohibiting the contracting of parking violations to another city processing agency in an outside county, is not violated when the outside agency simply contracts to provide limited service assistance. In order to be prohibited by section 40200.5(a) as a processing agency, the issuing agent must transfer a "comprehensive package of responsibilities" to the outside agency.

Lockheed Info. Management Serv. Co. v. City of Inglewood, Supreme Court of California, Decided January 8, 1998, 17 Cal. 4th 170, 948 P.2d 943, 70 Cal. Rptr. 2d 152.

Facts. A private bidder, Lockheed Information Management Services Co. (Lockheed IMS), which submitted a bid for a services contract to process parking tickets for the City of San Diego (in San Diego County), brought suit to enjoin the City of Inglewood (in Los Angeles County) from submitting a bid. Lockheed IMS claimed that Inglewood's bid violated the "within the county" provision of the statute, citing California Vehicle Code section 40200.5(a), which allows a parking violation "issuing agency" to "contract with the county, with a private vendor, or with any other city or county processing agency . . . within the county, . . . for the processing of notices of parking violations and notices of delinquent parking violations."

Inglewood claimed that the service the city provided was simply a computer program that facilitated the processing of data by allowing San Diego to use the Inglewood computer system, but required San Diego to enter the actual data into the system. Inglewood claimed in the preliminary injunction hearing at the trial level that its proposed contract with San Diego did not violate section 40200.5(a) because San Diego "remained responsible for all 'due process' and 'public relations' aspects of ticket processing, including physical collection of cash payments, receipt and handling of inquiries from ticket recipients, and administrative disposition of contested citations." The trial court denied a preliminary injunction and Lockheed IMS appealed.

The court of appeal reversed, finding that even Inglewood's limited activities in its proposal for services fell under the plain meaning of the word "processing," and so violated section 40200.5(a). Finding it likely that Lockheed IMS would succeed on the merits, the court of appeal granted the preliminary injunction. The California Supreme Court granted review to consider whether Inglewood's bid for parking citation management services violated section 40200.5(a) of the Vehicle Code.

Holding. Reversing the decision of the court of appeal, the California Supreme Court held that Inglewood, as a local government agency, had power independent of section 40200.5(a) to contract with other local governmental agencies. The supreme court further held that in Inglewood's proposal to provide parking services to San Diego, Inglewood did not assume the responsibility of a "processing agency" and so did not violate section 40200.5(a).

The court first held that absent any restriction imposed by section 40200.5(a), Inglewood was within its municipal powers when it proposed a contract for services with San Diego. The court looked to Government Code section 54981, which allows "any local [governmental] agency to contract with any other local [governmental] agency" for municipal services and other public contracts. The court stated that this code section, which gives express authority to local governmental agencies to receive services, also implicitly gives authority to those agencies who wish to provide municipal services. The court concluded in its finding in this regard that section 54981 gives authority to local governmental agencies to contract with other agencies for municipal services unless otherwise prohibited by law.

The court, in deciding whether Inglewood was a "processing agency" for purposes of section 40200.5(a), entered into a lengthy discussion of the legislative history and procedural processes by which municipal authorities have administered parking violations since the section was first made law in 1980. The court found that the Vehicle Code section which requires the processing agency to be within the county of the issuing agency contemplates only a "particular form of agreement . . . [which] historically included almost every pre-judicial activity required for the administration and disposition of parking tickets . . . ."

The court stated that in order to be contracting out to a "processing agency" for purposes of section 40200.5(a), the issuing agency (San Diego) must "transfer this comprehensive package of responsibilities from itself to another entity." The comprehensive package includes: "administration and disposition of parking tickets, including functions, such as the physical receipt of fines and penalties, the handling of motorist inquiries, and the investigation and resolution of contested citations . . . ." The court concluded that Inglewood's proposal to enter into an agreement with San Diego for limited service assistance allowed San Diego to retain the basic processing responsibilities and therefore did not violate the Vehicle Code. Finally, the court found that Inglewood's proposed limited service arrangement did not give Inglewood any of the independent discretionary authority that the Vehicle Code's provision requiring the processing agency to be within the county was designed to protect against.

In finding that Inglewood's proposal for services did not qualify as a "processing agency," and that Inglewood had other statutory authority as a local agency to contract with other local agencies, the court reversed the court of appeal's finding of preliminary injunction.

REFERENCES

Statutes and Legislative History:

CAL. CONST. art. XI, § 5 (West 1996 & Supp. 1998) (gives cities power, in city charters, to exclusively control those issues which are "municipal affairs").

CAL. VEH. CODE § 40200 (West Supp. 1998) (explains authority of municipalities to issue parking violations; procedural requirements).

CAL. VEH. CODE § 40200.5(a) (West 1998) (giving issuing agency of parking violations election of contracting with the county, a private vendor, or any other city or county processing agency within the county).

CAL. GOV'T CODE § 54981 (West 1997) ("the legislative body of any local agency may contract with any other local agency for the performance by the latter of municipal services or functions within the territory of the former.").

CAL. GOV'T CODE § 6254.9 (West 1995) (authorizing local or state agencies to sell, lease, or license computer software that it has developed).

Case Law:

Board of Trustees v. Municipal Ct., 95 Cal. App. 3d 322, 157 Cal. Rptr. 133 (1979) (explaining the procedural history of how municipal courts removed themselves from the parking violation system making parking violations civil in nature).

County of Los Angeles v. City of Alhambra, 27 Cal. 3d 184, 612 P.2d 24, 165 Cal. Rptr. 440 (1980) (construing the revenue-sharing relationship between cities and counties regarding parking violations).

Mervynne v. Acker, 189 Cal. App. 2d 558, 11 Cal. Rptr. 340 (1961) (construing parking meter regulation to be a matter of state-wide concern and not a matter of "municipal affairs," so that cities do not have exclusive control over regulation of parking meters).

Legal Texts:

56 AM. JUR. 2D *Municipal Corporations* § 493 (1971 & Supp. 1998) (discussing generally the power of municipalities to contract).

45 CAL. JUR. 3D *Municipalities* § 322 (1978) (discussing the authority of cities to contract with each other).

45 CAL. JUR. 3D *Municipalities* § 314 (1978) (discussing a city's power to contract in general).

4 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Parking and Registration Display Violations* § 1961 (2d ed. 1989) (discussing vehicle parking and registration display violations).

8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Matters of Statewide Concern*, Constitutional Law § 804 (9th ed. 1988) (general discussion of California law regarding municipal authority and issues of statewide concern).

Law Review and Journal Articles:

George D. Vaubel, *Toward Principles of State Restraint Upon the Exercise of Municipal Power in Home Rule*, 22 STETSON L. REV. 643 (1993) (discussing the allocation of governmental power between state and local entities including recent developments).

Carol Robertson Boman, *Sonoma County Organization of Public Employees v. County of Sonoma: The Contract Clause and Home Rule Powers Revitalized in California,* 68 CAL. L. REV. 829 (1980) (discussing the debate over the boundaries of "municipal powers" against issues of state-wide concern).

CHRISTOPHER JETER

X. PARENT AND CHILD

Pursuant to Probate Code section 6454, the estate of a decedent may pass to a foster child or stepchild if the foster or step relationship began during the child's minority and continued through the joint lifetimes of the decedent and child and if it is established by clear and convincing evidence that the child would have been adopted but for a legal barrier which began during the child's minority and continued throughout the joint lifetimes of the child and the decedent.

Estate of Joseph, Supreme Court of California, Decided January 12, 1998, 17 Cal. 4th 203, 949 P.2d 472, 70 Cal. Rptr. 2d 619.

Facts. Pursuant to section 6400 and following sections of the Probate Code, a deceased parent may pass his or her estate by intestate succession to his or her child as heir. Section 6454 of the Probate Code, unique to the State of California, provides that the parent-child relationship exists between an individual and the individual's foster parent or stepparent if: "(a) [t]he relationship began during the person's minority and continued throughout the joint lifetimes of the person and the person's foster parent or stepparent, and (b) [i]t is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier."

Louis Joseph died intestate. The petitioner sought a ruling from the probate court pursuant to Probate Code section 6454, claiming she was the deceased's daughter and sole heir, and was thus entitled to the deceased's entire estate. James C. Joseph, respondent and decedent's brother, opposed. The petitioner, Kim Barnum-Smith, was supported and cared for from age three by the deceased, Louis Joseph, and his wife, who predeceased him. The Josephs financed the petitioner's college education and "gave" her away at her wedding. The relationship between the Josephs and the petitioner "satisfied the common law definition of foster child." While the petitioner was a minor, the Josephs repeatedly asked the petitioner's natural parents for permission to adopt her. Each request was denied. Eventually, during the petitioner's minority, the Josephs' requests to adopt the petitioner ceased.

The probate court held that the relationship of parent and child, as defined in Probate Code section 6454, did not exist between the decedent and the petitioner. As a result, the petitioner was denied her claim to the decedent's estate. The court of appeal affirmed, concluding that while the petitioner established a "continuing relationship" between the deceased and the petitioner lasting throughout their joint lifetimes, a legal barrier to her adoption by the Josephs did not persist throughout the lifetimes of the petitioner and the deceased, rendering the petitioner's claim as daughter and sole heir to the decedent's estate untenable. Rejecting the holding in

Estate of Stevenson, 11 Cal. App. 4th 852, 14 Cal. Rptr. 2d 250 (1992), in which the sixth district held that the "legal barrier" to adoption need only exist at the time adoption was attempted or contemplated, and instead adopting Division Five of the Second District's holding in *Estate of Cleveland*, 17 Cal. App. 4th 1700, 22 Cal. Rptr. 2d 590 (1993), the court of appeal required that the adoption barrier exist during the child's minority and that it continue throughout the child's and foster or stepparent's lifetimes. The Supreme Court of California granted review to determine the legislative meaning and purpose for section 6454's requirement of clear and convincing evidence of adoption but for a legal barrier.

Holding. Affirming the decision of the court of appeal, the Supreme Court of California concluded that the holding in *Estate of Cleveland* embraced the proper interpretation of Probate Code section 6454, requiring the adoption barrier's existence during the child's minority and its continuation through the child and stepparent's joint lifetimes.

The supreme court took a literal approach to section 6454 by adopting its definition that step and foster children are heirs only when they would have been adopted "but for" a legal barrier. If, at some point before the death of the parent, the legal barrier no longer existed, it would cease being the "necessary cause of the failure to adopt." Accordingly, with the legal barrier no longer a bar to adoption, the failure to adopt would result only from a lack of intent by the parent to follow through with the adoption process. The supreme court reasoned that if an intent to adopt no longer existed, "it would signify that what might once have approached a parent-child relationship . . . might well have suffered a 'change in [its] nature or quality' in the interim . . . ." By requiring a continuing barrier and implying a lifetime intent to adopt, the supreme court reasoned that in the instance when a legal barrier has existed until death, "the failure to adopt would not imply the nonexistence of a parent-child relationship; it would be coterminous with the inability to adopt because of law. There would then be a kind of parent-child relationship that would be tantamount to that of adoption." Accordingly, in these instances, the foster or step child would become an heir to the parent.

The court identified the major purposes behind the Probate Code as efficiently and expeditiously passing the estate according to the intestate decedent's intent, and held that the *Cleveland* court's interpretation of Probate Code 6454 furthers these objectives. The court reasoned that if a parent declined to adopt a child in the absence of a legal barrier, the parent's intent to devise his/her estate would most likely be non-existent.

Applying Probate Code section 6454 to the facts in the case at bar, the petitioner did not dispute that a legal barrier did not persist throughout the joint lifetimes of the deceased and the petitioner. Accordingly, the supreme court affirmed the court of appeal's decision, finding that the petitioner was not the daughter of the deceased under section 6454, and was therefore not entitled to his estate as sole heir.

REFERENCES

Statutes and Legislative History:

CAL. PROB. CODE § 6400 (West 1991) (the estate of a deceased parent may pass by intestate succession to his child or heir).

CAL. PROB. CODE § 6454 (West Supp. 1999) (relationship of parent and child exists between a person and the person's foster parent or stepparent if there is a continuing relationship and "but for" a legal barrier the child would have been adopted).

Case Law:

Estate of Cleveland, 17 Cal. App. 4th 1700, 22 Cal. Rptr. 2d 590 (1993) (holding that Probate Code section 6454 requires the existence of a legal barrier to persist throughout the joint lifetime of a step or foster parent and a step or foster child).

Estate of Stevenson, 11 Cal. App. 4th 852, 14 Cal. Rptr. 2d 250 (1992) (holding that the legal barrier requirement of Probate Code section 6454 need only exist at the time adoption is attempted or contemplated).

Legal Texts:

12 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* § 152, 153B (9th ed. 1990 & Supp. 1998) (discussing the parent and child relationship and the provision for inheritance by a step or foster child).

Law Review and Journal Articles:

Margaret M. Mahoney, *Step Families in the Law of Intestate Succession and Wills,* 22 U.C. DAVIS L. REV. 917 (1989) (discussing Probate Code § 6408, predecessor and identical to Section 6454, detailing the evidence necessary to prove a parent-child relationship).

Thomas M. Hanson, *Intestate Succession for Stepchildren: California Leads the Way, But Has it Gone Far Enough?,* 47 HASTINGS L.J. 257 (1995) (examining the restrictive reading of Probate Code section 6454 by the *Cleveland* court vis-a-vis the more liberal reading by the *Stevenson* court, giving rationale for why a liberal reading is more desirable).

Ralph C. Boshman, *Children & Inheritance in the Non-traditional Family,* UTAH L. REV. 93 (1996) (discussing the shortcomings of Model Probate law and its failure to provide guidelines governing the inheritance rights of children outside the traditional nuclear family, including a discussion of novel California Code section 6454).

Ronald R. Volkman, *When are Step Children Heirs of Stepparent?,* 23 ESTATE PLANNING 253 (1993) (discussing the absence of a provision in Uniform Probate Code for step and foster children to become heirs, including a discussion of Probate Code section 6408, predecessor and identical to Probate Code section 6454).

CHRISTOPHER HUSBAND

XI. UNFAIR COMPETITION

A private for-profit corporation may maintain, on behalf of the general public, an unfair competition action against a retailer who, in violation of Penal Code section 308, sells cigarettes to minors. Such actions are permitted under the Business and Professions Code sections 17200-17209.

Stop Youth Addiction, Inc. v. Lucky Stores, Inc., Supreme Court of California, Decided February 23, 1998, 17 Cal. 4th 553, 950 P.2d 1086, 71 Cal. Rptr. 2d 731.

Facts. Lucky Stores, Inc., along with various other retailers located in Northern California, sold cigarettes to minors in direct violation of section 308 of the Penal Code. Stop Youth Addiction (SYA), a California for-profit organization, brought an action in the public interest against Lucky Stores. SYA sought $10 billion in restitution to be paid to the State of California, an injunction enjoining Lucky from selling cigarettes to minors, costs, and attorney fees.

The Superior Court of California sustained Lucky's general demurrer, stating that section 308 preempted private enforcement of such suits. The court of appeal, relying on prior case law, reversed. The Supreme Court of California granted Lucky's petition of review to determine the sufficiency of SYA's complaint.

Holding. The Unfair Competition Law (UCL), Penal Code sections 17200 -17209, defines unfair competition as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." This law encompasses all business practices.

Lucky impliedly conceded claims under sections 17200-17209. However, Lucky argued that SYA's suit was barred by the UCL because SYA lacked standing; Lucky argued that section 308 barred SYA's suit because section 308, along with the Stop Tobacco Access to Kids Enforcement Act (STAKE), embodied the legislature's intent to create, within section 308, an exclusive and exhaustive scheme for enforcing the law prohibiting the sale of tobacco to minors. Moreover, Lucky asserted public policy considerations against allowing private enforcement of the sale of tobacco to children.

Lucky asserted that only public prosecutors can enforce the statute. However, the California Supreme Court denounced this theory, citing case law and the statute itself as justification for the proposition that SYA did indeed have standing. The court stated that the issue regarding the source of UCL standing was affirmatively argued and decided in the prior cases. Additionally, neither Penal Code section 308 nor the STAKE Act contain any express reference to the UCL. Furthermore,

sections 17200 and 17203 of the UCL expressly state that "any unlawful business practice . . . may be redressed by a private action charging unfair competition." The court noted that had the legislature intended to change the UCL to prohibit enforcement by private actors, the legislature could have, and would have, done so. Indeed, the UCL maintained its language through several sessions in which amendments of the UCL were proposed; the legislature had rejected several pieces of legislation aimed at narrowing, broadening, or banning UCL standing toward private actors.

The court pointed to the history of California's unfair competition statutes as further justification for the proposition that "any person" may bring a civil action in the effort to enforce the penal law. Similarly, the court determined that the absence of an express provision within section 308 or the STAKE act, providing for private enforcement, was not meant as an implied bar against private action of these statutes.

The court further reasoned that section 308 and the STAKE act did not intend to repeal other state statutes. Rather, the legislature clearly stated its intent that the provisions of the UCL were to be cumulative as considered against other remedies and penalties. Private UCL action that "borrows violations" from section 308, in the attempt to establish predicate unlawful business activity, is not barred. The court noted that the SYA did not allege a private cause of action under section 308; it only "borrowed" its violations as unlawful practices independently actionable under section 17200. Thus, the SYA based its suit on the remedies of the UCL.
Lucky argued in favor of an implied repeal of the UCL's broad standing provision by the STAKE Act and section 308. However, the court rebuked Lucky's argument, stating that the acts were not irreconcilable, were clearly repugnant, and were inconsistent-the requirements for a successful argument of implied repeal. As such, the court determined that it was bound to "maintain the integrity" of each statute involved. Thus, the three statutes involved coexist. It is not inconceivable, in any context, that a single crime can trigger violations of more than one statute.

Lucky also asserted public policy considerations as a rationale in favor of its argument against private standing. Lucky argued that putting a public prosecutor's discretionary decision-making within the control of an "interested" party, who has no involvement in criminal prosecutions, would put prosecutors in the position to accept "an inappropriate financial benefit." However, the court found that SYA had no affiliation with any government agency and SYA had requested that any proceeds recovered in the suit be delivered directly to the State of California.

Lucky also alleged that SYA was bringing the suit in its own interest because SYA was seeking recoupment of its attorney fees. The court dismissed this concern, pointing to the fact that the Code of Civil Procedure provides for sanctions against frivolous lawsuits brought in bad faith. Also, attorney fees are only rewarded to a party if it actually wins the case. As such, any motivation to file a frivolous suit is adequately policed by the Code of Civil Procedure. Even more, from the economical perspective, the court noted that it is not within the court's power to determine

whether the policy of a statute is economically sound or beneficial; this is the job of the legislature.

Lucky further argued that public confidence in the legal system would be undermined if "private bounty hunters" were allowed to try cases involving the Penal Code, usurping the "essential neutrality" required of a prosecutor. Once again, however, the court sided with SYA in regard to the asserted public policy consideration. The court noted that allowing for private enforcement of the UCL, in this instance, would even the playing field, forcing Lucky to compete fairly with other law abiding retailers. Private enforcement promotes the achievement of the public policy goals underlying the initial enactments of section 308 and the STAKE Act.

REFERENCES

Statutes and Legislative History:

CAL. PENAL CODE § 308 (Deering 1985 & Supp. 1998) (forbidding the sale or furnishing of tobacco or smoking paraphernalia to minors).

CAL. BUS. & PROF. CODE §§ 17200-17209 (Deering 1985 & Supp. 1998) (defining and explicating the applicability of the Unfair Competition Law).

STOP TOBACCO ACCESS TO KIDS ENFORCEMENT ACT §§ 22950-22959 (conferring power upon the Department of Health Services to enforce laws forbidding the sale of tobacco to minors).

Case Law:

Committee on Children's Television, Inc. v. General Foods Corp., 35 Cal. 3d 197, 673 P.2d 660, 197 Cal. Rptr. 783 (1983) (supporting the proposition that a private actor has standing to assert a claim under the UCL).

Hernandez v. Atlantic Fin. Co., 105 Cal. App. 3d 65, 164 Cal. Rptr. 279 (1980) (supporting the proposition that a private actor has standing to assert a claim under the UCL).

Blatty v. New York Times, 42 Cal. 3d 1033, 728 P.2d 1177, 232 Cal. Rptr. 542 (1986) (holding that First Amendment limitations are applicable to all claims).

Rubin v. Green, 4 Cal. 4th 1187, 847 P.2d 1044, 17 Cal. Rptr. 2d 828 (1993) (holding that the UCL did not override the litigation privilege as it pertained to the particular facts in issue).

Manufacturer's Life Ins. Co. v. Superior Court, 10 Cal. 4th 257, 895 P.2d 56, 41 Cal. Rptr. 2d 220 (1995) (holding that the UCL cause of action, based on conduct that violates the Cartwright Act and the Unfair Insurances Practices Act, is not barred by the holding in *Moradi-Shalal v. Fireman's Fund Insurance Companies*, 46 Cal. 3d 287, 758 P.2d 58, 250 Cal. Rptr. 116 (1988)).

Legal Texts:

61 CAL. JUR. 3D *Unfair Competition* § 1 (1984 & Supp. 1998) (generally discussing and defining unfair competition principles and the basis for a cause of action).

61 CAL. JUR. 3D *Unfair Competition* §§ 7-15 (1984 & Supp. 1998) (delineating the kinds of acts which constitute unfair competition).

5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Unfair Competition, In General* § 728 (3d ed. 1985 & Supp. 1996) (overview of the UCL using case law).

2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Exposing Minors to Immorality* § 842 (2d ed. 1988) (overview of offenses relating to minors; furnishing tobacco is a misdemeanor).

Law Review and Journal Articles:

Wesley J. Howard, Note, *Former Civil Code Section 3369: A Study in Judicial Interpretation*, 30 HASTINGS L.J. 705 (1979) (explicating the history of the UCL and the notion that a private actor can enforce the UCL).

Seong Hwan Kim, *California's Unfair Competition Act: Will it Give Rise to Yet Another 'Wave' in Smoking and Health Litigation?*, 35 SANTA CLARA L. REV. 193 (1994) (explicating the provisions and implications related to the UCL).

James R. McCall et al., *Greater Representation for Children Consumers-Fluid Recovery, Consumer Trust Funds, and Representative Actions*, 46 HASTINGS L.J. 797 (1995) (discussing the advantages and disadvantages of representative actions as they relate to California statutes aimed at protecting consumers against harmful business practices).

John K. Paulson, *Rubin v. Green: Is Unrestricted Judicial Access at the Expense of the Victim the Right Choice?*, 25 U. WEST L.A. L. REV. 325 (1994) (exploring the

requirement of standing, the problem of attorney solicitation, and the *Rubin* decision as it relates to the UCL).

Review of 1983 Legislation, 15 PAC. L.J. 559 (1983) (discussing new developments enacted in recently passed legislation regarding criminal procedure, victims of crimes, and restitution).

GARY DEVLIN

XII. WORKERS' COMPENSATION

In the context of workers' compensation, an employer's insurer is subrogated to the employer's contractual rights and duties when the insurer stands in the employer's shoes in litigation; thus where an insurer initiates litigation against a third party, the third party has a right to recover attorney fees from the insurer based on the terms of the contract executed by the employer and the third party.

Tutor-Saliba Corp. v. Employers Mut. Liab. Ins. Co. of Wisconsin, Supreme Court of California, Decided March 2, 1998, 17 Cal. 4th 632, 951 P.2d 420, 71 Cal. Rptr. 2d 851.

Facts. A construction worker, George Staehling, fell down a flight of stairs while working at a building site for a subcontractor, PDM. As a result of his injuries in the accident, Staehling received workers' compensation benefits from PDM's insurer, Employers Mutual Liability Insurance Company of Wisconsin (Wisconsin). Additionally, Staehling filed suit against Tutor-Saliba, the general contractor of the project, and Cowelco, the subcontractor responsible for installation of the stairs. Wisconsin intervened in Staehling's suit against Tutor-Saliba and Cowelco to recover compensation benefits Wisconsin paid Staehling. All claims were settled and dismissed prior to trial with the exception of Wisconsin's reimbursement claim against Tutor-Saliba and Cowelco. The trial court found that PDM's contributory negligence accounted for more damages than Wisconsin paid out in benefits, and thus Wisconsin recovered nothing in the suit against Tutor-Saliba and Cowelco.

Tutor-Saliba filed a memorandum to recover attorney fees from Wisconsin pursuant to a provision in Tutor-Saliba's contract with PDM. The contract provision provided attorney fees to the prevailing party in the event of litigation. The trial court denied the motion for attorney fees because it found that Tutor-Saliba was not the prevailing party in the suit. The court of appeal affirmed the denial of attorney fees, focusing on the unique context of workers' compensation law. The court did not address whether Tutor-Saliba was the prevailing party in the suit. The California Supreme Court granted review to address the issue of whether attorney fees were available to the general contractor from the subcontractor's insurance carrier pursuant to a contract provision between the general contractor and the subcontractor.

Holding. Reversing and remanding the decision of the court of appeal, the California Supreme Court unanimously held that a contract provision for attorney fees in a contract between the general contractor and the subcontractor made attorney fees available to the general contractor where the insurer stood in the shoes of the subcontractor.

While workers' compensation benefits limit an injured worker's remedy against the employer, neither the worker nor the employer is so limited in pursuing recovery

from a negligent third party. Employers may purchase insurance to cover potential workers' compensation liability. The insurer may pursue reimbursement for benefits it pays out to injured workers. The decision to pursue reimbursement from other liable parties is at the discretion of the insurer. The insurer is subrogated when it stands in the shoes of the employer in litigation against the third party. Thus, the insurer assumes both the rights and liabilities of the employer.

The court noted that the insurer's subrogation flows from the employer, not from the injured worker. As an example, the court pointed out that the employer, not the injured worker, may seek reimbursement for workers' compensation benefits from the third party. The insurer, therefore, also has the right to pursue reimbursement against the third party because its subrogation flows from the employer rather than from the injured worker. Just as an insurer's rights flow from the employer's rights, so too do the insurer's obligations flow from the employers' obligations. Thus, Wisconsin's duty to pay attorney fees depended not on the injured worker's duty to pay attorney fees, but rather on the insured employer's contractual duty. The court reasoned that the insurer voluntarily pursues reimbursement and must weigh the risks of litigation accordingly. The court urged that subrogation is a right, not an obligation. Where an insurer affirmatively subrogates itself to an employer, it acquires both rights and responsibilities. As a result, PDM's contract provisions with Tutor-Saliba bound Wisconsin when Wisconsin stood in PDM's shoes in litigation with Tutor-Saliba. Therefore, an attorney fees provision in the contract would bind Wisconsin upon a finding that Tutor-Saliba was the prevailing party.

REFERENCES

Statutes and Legislative History:

CAL. INS. CODE § 11662 (West 1988 & Supp. 1998) (subrogating an insurer's rights to the insured employer's liability for compensation).

CAL. LAB. CODE § 3602 (a) (West 1988 & Supp. 1998) (limiting an injured worker's remedy against his employer to workers' compensation benefits).

CAL. LAB. CODE § 3700 (West 1988 & Supp. 1998) (requiring employers to secure payment for workers' compensation for injuries sustained on the job).

CAL. LAB. CODE § 3852 (West 1988 & Supp. 1998) (employer or injured worker may bring an action directly against a negligent third party to recoup workers' compensation benefits paid).

CAL. LAB. CODE § 3853 (West 1988 & Supp. 1998) (allowing an employer to join as a party plaintiff or to intervene in an action brought by the injured worker against the negligent third party).

CAL. LAB. CODE § 3856 (b) (West 1988 & Supp. 1998) (allowing an employer to file for first lien for reimbursement on an award to the injured worker from the negligent third party).

CAL. LAB. CODE § 3864 (West 1988 & Supp. 1998) (precluding a liable third party from seeking indemnification from a negligent employer without an agreement thereto prior to the injury).

Case Law:

Catello v. Liberty Mut. Ins. Co., 152 Cal. App. 3d 1009, 200 Cal. Rptr. 4 (1984) (allowing a third party to recover costs against an employer's insurer who intervened in an injured worker's suit but voluntarily dropped on the first day of trial).

New Plumbing Contractors, Inc. v. Nationwide Mut. Ins. Co., 7 Cal. App. 4th 1088, 9 Cal. Rptr. 2d 469 (1992) (providing that an insurer is not responsible for an employer's increased premiums because the insurer is not bound to seek reimbursement through litigation).

Phelps v. Sostad, 16 Cal. 4th 23, 939 P.2d 760, 65 Cal. Rptr. 2d 360 (1997) (prioritizing the payment of an award from a negligent third party first for litigation expenses and attorney fees, then to the employer's costs in compensation benefits, and finally to the injured worker).

Legal Texts:

65 CAL. JUR. 3D *Work Injury Compensation* §§ 355-366 (1985 & Supp. 1998) (generally discussing the rights and liabilities of a third party tortfeasor).

65 CAL. JUR. 3D *Work Injury Compensation* § 383 (1985 & Supp. 1998) (discussing insurer subrogation).

2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* § 66 (9th ed. & Supp. 1997) (generally discussing an action against a third party tortfeasor).

2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* §§ 78-81 (9th ed. & Supp. 1997) (discussing an employer's avenues to seek reimbursement from a third party tortfeasor).

Law Review and Journal Articles:

Howard A. Emmer, *California Workers' Compensation and Third Party Litigation*, 15 U. WEST L.A. L. REV. 1 (1983) (examining the implications of third party litigation).

Howard A. Emmer, *California Comparative Negligence in Industrial Accident Cases –A Historical and Practical Approach*, 7 WHITTIER L. REV. 327 (1985) (discussing the application of comparative fault in third party litigation).

Anthony P. Pascale, Comment, *Employer Subrogation: The Effect of Injured Employee Negligence in Workers' Compensation/Third Party Actions*, 18 SAN DIEGO L. REV. 301 (1981) (discussing the implications of *Arbaugh v. Proctor & Gamble Mfg. Co.*).

Laura Quackenbush, Note, *Workers' Compensation Exclusivity and Wrongful Termination Tort Damages: An Injurious Tug of War?*, 39 HASTINGS L.J. 1229 (1988) (examining the conflict between the exclusivity doctrine and wrongful termination damages).

L. Allen Songstad, Note, *Attorney's Fees in Third Party Workmen's Compensation System,* 21 HASTINGS L.J. 717 (1970) (discussing the impact of sections 3856 and 3860 of the Labor Code).

STACEY PERKINS ROCK